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Erratum

THE BUFFALO LAW REVIEW wishes to correct a citation error appearing in our Volume 44-1. In his article, Searching for the Plain Meaning of the Second Amendment, 44 BUFF. L. REV. 197 (1996), Kevin Szczepanski cited to an article authored by Dennis Henigan and Keith Ehrman entitled: The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?, 15 U. DAYTON L. REV. 5 (1989). Although Mr. Szczepanski properly cited to Mr. Henigan and Mr. Ehrman's article on numerous oc- casions, he incorrectly cited to their article in support of the pro- position that the "central purpose" of the Second Amendment is to ensure that individuals citizens would be armed as a deter- rent against federal tyranny. Mr. Szczepanski quoted the article as follows "[T]he [Slecond [A]mendment is aimed at ensuring that all private citizens would be armed, and thus able to rise up in revolt against any goverment action perceived by the masses at 'tyrannical'" Id. at 216 n. 114.

Unfortunately, this quotation has been taken out of context. The quoted language descibes not the viewpoint of Mr. Henigan and Mr. Ehrman, but rather that of "those who oppose govern- ment efforts to regulate firearms . . . ." 15 U. DAYTON L. REV. at 24. The next paragraph, and indeed Mr. Henigan and Mr. Ehrman's entire article, -is devoted to refuting the thesis ex- pressed in the quoted language. As the authors argue, the pur- pose of the Second Amendment is to protect the people's right to be armed in service to state-sponsored militias, not to resist the* "tyranny" of federal agencies.

Searching for the Plain Meaning of the Second Amendment

KEVIN D. SZCZEPANSKI†

A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.[1]

INTRODUCTION

A. *The Controversy*

Not surprisingly, controversy has surrounded the Second Amendment ever since the adoption of the federal Bill of Rights in 1791.[2] Unlike cases involving the other amendments, which usually focus on the outer margins of the rights they provide, the Second Amendment debate has not resolved the Amendment's very purpose.[3] Difficult questions remain regarding each phrase of the Second Amendment: What is a "well regulated militia?" Why is one "necessary to the security of a free state?" Who are "the people?" What is the scope of their right to "keep and bear arms?" To what extent shall that right "not be infringed?"

Traditionally, the answers to these questions have depended upon which clause of the Second Amendment is emphasized. At one extreme, "state's right" commentators emphasize the Militia

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1. U.S. CONST. amend. II. Variations are common in the punctuation and capitalization of the Second Amendment. David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL. 1 n.1 (1987) [hereinafter *Histography*]. Another version places commas after "militia," "state" and "arms." *Id.*; Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 206 (1983). Although the use of only one comma after the word "state" departs from the traditional punctuation of the Amendment, it is used here to emphasize the two distinct clauses and conditional structure of the Second Amendment. *See infra* notes 4 and 6.

2. *See* Nelson Lund, *The Second Amendment, Political Liberty and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 108 (1987) (recognizing that the right guaranteed by the Second Amendment is by no means "self-evident"); *Histography*, *supra* note 1, at 1; *see also* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 643-44 (1989) ("No one has ever described the Constitution as a marvel of clarity, and the Second Amendment is perhaps the worst drafted of all its provisions.").

3. *See Historiography*, *supra* note 1, at 1; Levinson, *supra* note 2, at 644; Lund, *supra* note 2, at 108.

Clause,[4] arguing that the Second Amendment guarantees only a state's right to maintain organized military units.[5] At the other extreme, "individual right" commentators emphasize the Right to Arms Clause,[6] arguing that the Second Amendment guarantees an individual's right to possess ("keep") and carry ("bear") arms.[7] Each group declines to read substantive content into the particular clause that the other emphasizes. Thus, individual right theorists argue that the Militia Clause is little more than a precatory recognition of the importance of a militia to the security of the Republic.[8] State's right commentators argue that the Right to Arms Clause ensured only the collective role of "the people" in preserving the security of the Republic.[9]

The bitter political debate over crime control complicates the legal debate over the Second Amendment's plain meaning.[10] The upsurge in drive-by shootings, carjackings and tourist murders in many of our nation's major cities weakens the political clout of the individual right position by multiplying the incentives for federal and state handgun regulation.[11] But the "specter" of the Second

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4. "A well regulated militia being necessary to the security of a free state, ..." U.S. CONST. amend. II.

5. *Id.*; *see* Kates, *supra* note 1, at 206, 216-18.

6. "[T]he right of the people to keep and bear arms shall not be infringed." U.S. CONST. amend. II.

7. *Historiography*, *supra* note 1, at 1; Kates, *supra* note 1, at 206.

8. *See, e.g.*, *Historiography*, *supra* note 1, at 59-61 (arguing that the militia clause was intended only as a recognition of the importance of a militia to a free state, not as a restriction on the individual right to arms).

As Don Kates explains, the individual right view is rejected by a majority of legal scholars. Kates, *supra* note 1, at 206. Indeed, one eminent commentator on constitutional law is so convinced that the Second Amendment guarantees no individual right that he relegates his brief analysis of the Amendment to a single footnote within his discussion of the federal legislative power. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5.2, at 299 n.6 (2d ed. 1988).

However, the individual right view is accepted by a majority of nonlegal scholars and the general public who, "though supporting the idea of controlling guns, increasingly oppose their prohibition, believing that law-abiding citizens may properly have them for self-defense." Kates, *supra* note 1, at 206.

9. *See, e.g.*, Lawrence D. Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22, 23, 31 (1984). As Don Kates observes, the state's right theory is accepted by the majority of legal scholars, as well as the American Civil Liberties Union and the American Bar Association. Kates, *supra* note 1, at 207.

10. For one example of potent sarcasm, see Margaret P. Anderson, *Knox and the NRA: Some Quick Draws*, WALL ST. J., Nov. 22, 1993, at A15 ("[T]hanks to Neal Knox and his NRA . . . , I understand that what I should really worry about is the takeover of the U.S. government by Nazis—and that the way to counter this possibility is to buy myself a gun. Thanks . . . for setting me straight.").

11. Recently, Congress enacted the long-awaited "Brady Bill" into law. The Brady Handgun Violence Protection Act, 18 U.S.C. §§ 921-23 (1993), imposes a national five-day

Amendment frequently is raised as a political and legal impediment to gun control legislation.[12]

B. *The Search for Plain Meaning*

The controversy surrounding the Second Amendment challenges both legal and nonlegal scholars to neutrally derive, define and apply the Second Amendment's plain meaning.[13] The search

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waiting period on the purchase of a handgun. 18 U.S.C. § 922(s)(1)(A)(ii)(I). A sunshine provision limits the Act to sixty months. 18 U.S.C. § 922(s)(1). The Act also provides for an elaborate "national instant criminal background check system," 18 U.S.C. § 922(t)(1), which would reduce the waiting period to three days. 18 U.S.C. § 922(t)(1)(B)(ii).

12. Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5, 6 (1989); Kates, *supra* note 1, at 204; Anderson, *supra* note 10, at A15; David S. Broder, *NAFTA May Be a Winner, But Crime is the Bigger Worry*, WASH. POST NAT'L WKLY., Nov. 22-28, 1993, at 13.

13. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA 146-53 (1990). Judge Bork explains that the plain meaning of a constitutional provision is best understood in light of the original understanding of the Framers of the Constitution. Neutral *derivation* of principle ensures that judges may never create new constitutional rights, or destroy old ones, based upon their inclinations toward a particular ideology or interest group. *Id.* at 146-47. Neutral *definition* of principle means defining a principle thoughtfully but narrowly based upon the "words, structure and history of the Constitution." *Id.* at 148, 150. Neutral *application* of principle involves application that is consistent and without regard to a judge's sympathy or lack of sympathy with the parties to a lawsuit. *Id.* at 151.

For further discussion of the importance of originalism in constitutional interpretation, see Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849 (1989) [hereinafter *Originalism*]; Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) [hereinafter *Rule of Law*].

For Supreme Court decisions espousing the original understanding in interpreting constitutional provisions, see Nixon v. United States, 506 U.S. 224 (1993); New York v. United States, 505 U.S. 144 (1992); Collins v. Youngblood, 497 U.S. 37 (1990); United States v. Munoz-Flores, 495 U.S. 385 (1990); Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Sun Oil Co. v. Wortman, 486 U.S. 717 (1988); Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468 (1987); O'Connor v. Ortega, 480 U.S. 709 (1987); Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986); Bowsher v. Synar, 478 U.S. 714 (1986); Oliver v. United States, 466 U.S. 170 (1984); Lynch v. Donnelly, 465 U.S. 668 (1984); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984); INS v. Chadha, 462 U.S. 919 (1983); Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980); Craig v. Boren, 429 U.S. 190 (1976); Buckley v. Valeo, 424 U.S. 1 (1976); Richardson v. Ramirez, 418 U.S. 24 (1974); Colgrove v. Battin, 413 U.S. 149 (1973); Oregon v. Mitchell, 400 U.S. 112 (1970); Powell v. McCormack, 395 U.S. 486 (1969); Graham v. John Deere Co., 383 U.S. 1 (1966); Bartkus v. Illinois, 359 U.S. 121 (1959); Adamson v. California, 332 U.S. 46 (1947); Cramer v. United States, 325 U.S. 1 (1945); Carter v. Carter Coal Co., 298 U.S. 238 (1936); Patton v. United States, 281 U.S. 276 (1930); Olmstead v. United States, 277 U.S. 438 (1928); Myers v. United States, 272 U.S. 52 (1926); Polluck v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895); Strauder v. West Virginia, 100 U.S. 303 (1879); Slaughter-House Cases, 83 U.S. 395 (1873); Legal Tender Cases, 79 U.S. 287 (1870); Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Martin v. Hunter's

for plain meaning requires analysis of the historical context and language of the Second Amendment's twenty-seven words.[14]

This Comment develops the conditional, individual right to keep and bear arms[15] through analysis of the historical context and language of the Second Amendment. Specifically, the right of the people to keep and bear arms is a narrow individual right that is expressly conditioned on the necessity of a well regulated militia to the security of a free state. Part I discusses two traditional Second Amendment interpretations, the state's right and individual right theories. Part II supplies the historical context of the conditional, individual right from English common law, through the adoption of the Constitution, to the Second Amendment's ratification. This part next explains the scope of the conditional, individual right through analysis of the plain meaning of each phrase of the Second Amendment. Where one keeps and bears arms specifically in order to defend oneself against federal government attempts to establish a tyranny, the Second Amendment protects one's conduct.

Part III examines Supreme Court and circuit court decisions involving the Second Amendment. Although these decisions do not thoroughly analyze the historical context and language of the Sec-

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Lessee, 14 U.S. (1 Wheat.) 304 (1816); Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798); Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796).

The challenge, as one commentator has suggested, is to devise an interpretation of the Second Amendment that would be acceptable to the Supreme Court "in light of its modern approach to civil liberties." Lund, *supra* note 2, at 130.

14. Chief Justice Marshall emphasized the importance of plain language constitutional interpretation in Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819):

> It is not enough to say, that this particular case was not in the mind of the convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception.

Id. at 644.

Robert Dowlut also has recognized the importance of "interpretivism," or "deciding constitutional issues [based only upon] . . . norms that are stated clearly or implicitly in the written Constitution." Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59, 59-60 (1989) (citing JOHN HART ELY, DEMOCRACY AND DISTRUST 1 (1980)) [hereinafter *Guarantees to Arms*].

15. David Hardy previously has suggested a "hybrid" interpretation of the Second Amendment, in which the right to keep and bear arms is individual but its source is collective. *Historiography, supra* note 1, at 2 n.4; *see* David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559, 615-22 (1986) [hereinafter *Armed Citizens*]. Thus, "individuals are seen as having a right to possess arms suitable for organized military reserve duty." *Historiography, supra* note 1, at 2 n.4. However, Mr. Hardy seems to have retreated from his hybrid interpretation by later suggesting the primacy of the right to arms clause of the Second Amendment. *Id.* at 61.

ond Amendment, they are consistent with this comment's conditional, individual right theory. Finally, Part IV argues that if the conditional, individual right theory were accepted, it would be necessary to hinge greater protection of the individual right to keep and bear arms on state constitutions and courts.

I. TRADITIONAL INTERPRETATIONS OF THE SECOND AMENDMENT

A. *The State's Right Theory*

State's right theorists[16] emphasize the Militia Clause of the Second Amendment: "A well regulated militia being necessary to the security of a free state . . . ."[17] These theorists view the Second Amendment as a reaction to the Congressional power to provide for calling forth the militia[18] and for organizing, arming and disciplining it.[19] A fear had arisen in the young Republic that Congress might use its constitutional powers to disarm the states' organized militias, leaving the states defenseless against federal tyranny.[20] The Second Amendment was adopted in order to "place the states' organized military forces beyond the federal government's power to disarm, guaranteeing that the states would always have sufficient force at their command to nullify federal impositions on their rights and to resist by arms if necessary."[21]

State's right theorists also view the Second Amendment as a hedge against a large, potentially oppressive federal standing army.[22] Even though the federal government had the authority to

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16. For commentary advocating the state's right theory of the Second Amendment, see Cress, *supra* note 9; Ehrman & Henigan, *supra* note 12; Peter B. Feller & Karl L. Gotting, *The Second Amendment: A Second Look*, 61 NW. U. L. REV. 46 (1966); Ralph J. Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 CATH. U. L. REV. 53 (1966); Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961 (1975); John C. Santee, Note, *The Right to Keep and Bear Arms*, 26 DRAKE L. REV. 423 (1977).

17. U.S. CONST. amend. II.

18. *Id.* art. I., § 8, cl. 15 ("Congress shall have Power . . . [t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions[.]").

19. *Id.* cl. 16 ("Congress shall have Power . . . [t]o provide for organizing, arming, and disciplining, the Militia, . . . reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.").

20. Kates, *supra* note 1, at 212.

21. *Id.*

22. *Id.* Alexander Hamilton and James Madison addressed popular concerns about the supposed dangers of large standing armies in peacetime in THE FEDERALIST Nos. 24-29 (Alexander Hamilton), No. 46 (James Madison).

The Federalist is the first and most authoritative commentary on the United States

maintain small standing armies in times of need,[23] the basic defense of the republic would rest in the states' reserved military power to maintain their own officially organized military units.[24] The Second Amendment "not only guaranteed the states' right to keep armed forces, but obviated any need for a massive federal military which might defeat them if they found it necessary to revolt."[25]

The language of the Second Amendment reveals two problems with the state's right theory. First, the theory essentially ignores the Right to Arms Clause, which expressly guarantees the right of "the *people*," not the states, to keep and bear arms.[26] Second, the theory supposes too narrow a definition of the term "militia" in the Militia Clause. In the eighteenth century, the term "militia" rarely was used to refer to organized military units. The militia included "the whole militarily qualified citizenry."[27] These problems with the state's right theory have raised significant questions about its validity, and engendered the second of the two traditional interpretations of the Second Amendment.

B. *The Individual Right Theory*

Unlike state's right theorists, individual right theorists[28] emphasize the Right to Arms Clause of the Second Amendment: "the right of the people to keep and bear arms shall not be infringed."[29] These theorists read the phrase "right of the people" as naturally creating not a state right, but one that individual citizens may as-

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Constitution. THE FEDERALIST vii (Clinton Rossiter ed., 1961). The work originally was published as a series of letters at fairly regular intervals from October 27, 1787 to August 16, 1788. *Id.* at viii.

23. Kates, *supra* note 1, at 212; *see* THE FEDERALIST No. 24, at 157, 161 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

24. For example, in their respective National Guard units. Kates, *supra* note 1, at 212; Lund, *supra* note 2, at 106.

25. Kates, *supra* note 1, at 212.

26. U.S. CONST. amend. II (emphasis added).

27. Lund, *supra* note 2, at 106 n.6 (suggesting that the "language of the Constitution actually refutes [the state's right theory]"). For a discussion of the plain meaning of the term "militia" in the Second Amendment, see *infra* part II.B.1.

28. For commentary advocating the individual right theory of the Second Amendment, see David I. Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URB. L.J. 31 (1976); Dowlut, *supra* note 14; Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65 (1983); Richard E. Gardiner, *To Preserve Liberty—A Look at the Right to Keep and Bear Arms*, 10 N. KY. L. REV. 63 (1982); *Armed Citizens*, *supra* note 15; *Historiography*, *supra* note 1; Kates, *supra* note 1; Robert E. Shalhoupe, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982) [hereinafter *Ideological Origins*].

29. U.S. CONST. amend. II.

sert.[30] A natural reading of the phrase is supported by the interpretation of similar language in the First, Fourth, Ninth and Tenth Amendments.[31]

Some individual right theorists actually accept the state's right theory, but argue that the Second Amendment had a dual purpose: to protect not only the states' right to have organized militias, but also to an individual right to keep and bear arms.[32] This argument increases the rhetorical burden on opposing state's right theorists: they must show that the Second Amendment was intended to guarantee a *state* right, but was not intended to protect an *individual* right.[33]

At least one problem arises with the individual right theory. Specifically, the exact scope of the individual right is not self-evident, and is not expressly defined in the Constitution.[34] Since many individual right theorists argue that the federal and the state governments may not infringe on the right to keep and bear arms, the "logical conclusion" is that individuals may keep and bear grenades, machine guns, missiles, tanks or whatever "arms" they desire.[35] Such a broad definition of "arms" conflicts sharply with the contemporary desire to ban assault weapons and curtail handgun sales.[36]

Neither of the traditional interpretations account adequately for both clauses of the Second Amendment. Analysis of the history

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30. Kates, *supra* note 1, at 213.

31. U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble . . . ."); U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers and effects . . . shall not be violated . . . ."); U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); U.S. CONST. amend. X ("The powers not delegated to the United States . . . are reserved to the States . . . or to the people.").

The Bill of Rights relates foremost to private, individual rights. *See* 12 PAPERS OF JAMES MADISON 193-94 (R. Rutland and C. Hobson eds., 1977). Thus, "the people" as used in the Bill of Rights refers not to states' rights, but to individual rights.

32. *See, e.g.*, Kates, *supra* note 1, at 213; *Ideological Origins*, *supra* note 28, at 610.

33. *See* Kates, *supra* note 1, at 213. As Mr. Kates suggests, this rhetorical "double burden" is itself made difficult by the plausible natural reading of the phrase "right of the people." *Id.*

34. Lund, *supra* note 2, at 504.

35. Michael T. O'Donnell, Note, *The Second Amendment: A Study of Recent Trends*, 25 U. RICH. L. REV. 501, 503-04 (1991). For a discussion of the plain meaning to the term "arms" in the second amendment, see *infra* part III.B.6.

36. *See, e.g.*, Broder, *supra* note 12, at 13; William Schneider, *Crime Pays For the Politicians; How the Politics of Fear Devoured the Incumbents*, WASH. POST, Nov. 7, 1993, at C1 (arguing that public's desire for stronger gun control measures has increased marginally from 1989 to 1993). For a discussion of the term "arms" in the Second Amendment, see *infra* part III.B.6.

and language of the Second Amendment should incorporate both the Militia Clause and the Right to Arms Clause, which together form the Amendment's conditional structure.

II. The Conditional, Individual Right to Keep and Bear Arms

The Second Amendment right to keep and bear arms is a narrow individual right that is expressly conditioned on the necessity of a well regulated militia to the security of a free state.[37] Analysis of the Second Amendment's historical context and language supports this conclusion.

A. *The Historical Context of the Second Amendment*

1. *English Common Law.* English common law placed significant conditions on the individual right to have arms.[38] In 1181, King Henry II issued the earliest known decree pertaining to the right, the "Assize of Arms."[39] The decree allowed all freemen to keep arms, but only those "suited to [their] station[s] in life," and only "to aid in the defense of the kingdom."[40] In 1285, King Edward I issued the Statute of Winchester,[41] which required that all freemen not only have arms, but also periodically train with arms in the event that they were called upon to defend the kingdom.[42] The language of the statute thus suggests that its purpose was not to create a *broad* individual right to have arms, but a *narrow* individual right conditioned on the need for a militia to ensure the kingdom's security.[43]

Four subsequent legislative acts further demonstrate the conditional nature of the common law right to arms. The Statute of

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37. U.S. Const. amend. II; *see also* Ehrman & Henigan, *supra* note 12, at 34 ("[T]he right of an individual to keep and carry arms only exists in the context of contributing to a 'well-regulated militia.' "); Lund, *supra* note 2, at 122 (arguing that "[t]he Second Amendment gives individuals a constitutional right to keep [and bear] such private arms as will enable them to constitute a reasonable deterrent against government attempts to institute a repressive political regime."). For a discussion of the plain meaning of the phrase "security of a free state" in the Second Amendment, see *infra* part III.B.

38. *See* Ehrman & Henigan, *supra* note 12, at 7-14; *Historiography*, *supra* note 1, at 7-24.

39. *The Assize of Arms, reprinted in* 2 English Historical Documents 416 (David C. Douglas ed., 1953); Ehrman & Henigan, *supra* note 12, at 8.

40. Ehrman & Henigan, *supra* note 12, at 8.

41. *Id.* (citing Lois G. Schoerr, No Standing Armies 14 (1974)).

42. *Id.*

43. *Id.*

Northhampton,[44] issued by King Edward III in 1328, sharply narrowed the scope of the individual right. The statute provided that no man should "go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere."[45] Three centuries later, King James I repealed the Statute of Winchester,[46] eliminating the requirement of freemen to keep arms.[47] James I also enacted a statute requiring collection of all magazines of arms and provisions in a centralized placed in each county.[48] Seventy years later, Charles II issued a statute that restricted possession of arms to noblemen and those freemen owning land worth 100 pounds.[49]

The English Bill of Rights frequently is claimed to have established a broad, individual right to bear arms.[50] But the Bill's language refutes such a claim: "[T]he subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law."[51] The Bill restricted the rights to Protestants, and guaranteed the right only insofar as the arms were (1) for defense,

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44. Statute of Northhampton, 1938, 2 Edw. 3, ch. 3 (Eng.).

45. *Id.* This apparently complete proscription against traveling with arms suggests that the right to "bear," or carry, arms was narrowly conditioned upon the need to defend the kingdom. Indeed, the Statute of Northhampton frequently is cited as proof that no common law right to arms ever existed. *See* Ehrman & Henigan, *supra* note 12, at 8; Weatherup, *supra* note 16, at 965. For a discussion of the plain meaning of the term "bear" in the second amendment, *see infra* part III.B.5.

46. Statute of Winchester, 1603, 1 Jam., ch. 25 (Eng.).

47. Ehrman & Henigan, *supra* note 12, at 8.

48. *Id.* (citing 4 HENRY D. TRAILL, SOCIAL ENGLAND 42 (1895)).

49. An Act for the Better Preservation of the Game, and for Securing Warrens Not Inclosed, and the Severall Fishings of this Realme, 1670, 22 & 23 Car. 2, ch. 25 (Eng.); Ehrman & Henigan, *supra* note 12, at 9.

50. *See* Ehrman & Henigan, *supra* note 12, at 12-13 ("The opponents of gun regulation commonly claim that Parliament was asserting [in the English Bill of Rights] the absolute right of English citizens to carry arms. . . . Some commentators state that [this was done] to ensure that a tyrannical monarch would never again be able to render the citizenry helpless.").

The English Bill of Rights reads in part:

> Whereas the late King James II did endeavor to subvert and extirpate the Protestant religion and the laws and liberties of this kingdom by . . . raising and keeping a standing army within this kingdom without the consent of Parliament and quartering soldiers contrary to law, *by causing several good subjects being Protestants to be disarmed* at the same time when papists were both armed and employed contrary to law . . . [therefore] . . . [we] declare . . . that *the subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law.*

Bill of Rights, 1688, 1 W. & M. 2, ch. 2 (Eng.) (*quoted in* Ehrman & Henigan, *supra* note 12, at 12) (alteration in original) (emphasis added).

51. Ehrman & Henigan, *supra* note 12, at 12 (quoting Bill of Rights, 1688, 1 W. & M. 2, ch. 2 (Eng.)).

(2) suitable to the Protestants' conditions and (3) allowed by law.[52]

Finally, the emerging need for a standing army in seventeenth-century England also suggests that the common law guaranteed only a conditional, individual right to arms. Even though the army of James I was handpicked, personally financed and more than twice as large as the army of William of Orange, William successfully "conquered" England in the Glorious Revolution of 1689.[53] William's defeat of James I revealed three benefits of a standing army over the old, militia-based defense system. First, a standing army would allow England to protect its forces across Europe at a time of heightened risk of military involvement with France and Holland.[54] Second, since an invasion of England likely would be spearheaded by French troops, a standing army afforded England the important benefit of well drilled, technologically equipped troops.[55] Third, England's financial revolution during the 1690's made possible sufficient funding for a standing army.[56]

As the notion of a standing army gradually became more acceptable to English citizens,[57] professional military forces gradually supplanted the old, militia-based defense system. This supplantation, in turn, made less plausible the traditional justifications for the individual right to keep and bear arms.[58]

2. *Adoption of the Constitution of 1787.* Initially, two problems arise in interpreting the Second Amendment through analysis of the debates on the adoption of the Constitution. First, despite one commentator's assertion of "unanimity" in the Framers' understanding of the Second Amendment,[59] analysis of the

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52. *Id.*

53. *Historiography, supra* note 1, at 13. James mustered more than twice the 12,000 troops that supported William. *Id.* Reportedly, dissention among James' officers, culminating in the conspiracy and defection to William of James' commander-in-chief, prevented James from ever joining battle. *Id.* at n.41.

54. *Id.* at 13 ("For England to accept William also meant being drawn into the ongoing struggle between Holland and France and facing the risk of James' return with a French army.").

55. *Id.* at 14 ("[D]rill, for the first time in modern history became the precondition for the military success . . . ." (citation omitted)).

56. *Id.*

57. *Id.* at 15.

58. *Id.* Specifically, under the old, militia-based defense system, the individual right to keep and bear arms was conditioned upon the necessity that all able-bodied freemen ensure the security of the kingdom. Logically speaking, since standing armies gradually were supplanting the role of the militia system in ensuring the national defense, the individual right to have arms was becoming more difficult to justify. *See supra* notes 38-57 and accompanying text.

59. Kates, *supra* note 1, at 226 n.90.

constitutional debates reveals the "quixotic nature" of any attempt to demonstrate that all the Framers had a single understanding.[60] Second, the adoption debates did not discuss specifically the right to keep and bear arms.[61] Nevertheless, analysis of the adoption debates reveals the constitutional "conflict" between the federal government and the states regarding the militia power, which eventually led to the adoption of the Second Amendment.[62]

The adoption debates demonstrate the Framers' preference for a conditional, individual right to keep and bear arms. Some commentators cite James Madison for the proposition that the Framers recognized a broad individual right to keep and bear arms.[63] Specifically, they cite a short passage from *The Federalist*, in which Madison wrote that Americans possess the "advantage of

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60. *Historiography*, *supra* note 1, at 2. Of course, it still is possible to derive and define the original understanding of the Second Amendment. Analysis is required not only of the text itself, but also secondary materials such as the debates on the adoption of the Constitution, inasmuch as they reflect the objective intent of the Framers at the time of the adoption.

61. *See* DEBATES IN THE FEDERAL CONVENTION OF 1787 AS REPORTED BY JAMES MADISON, *reprinted in* DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 109-745 (Charles C. Tansill ed., 1927); *see also* Ehrman & Henigan, *supra* note 12, at 20. However, the debates focused in depth on the role of the militia and the foreseeable needs and risks of a standing army. *Id.* Specifically, the Federalists argued that in order to have an effective militia, extensive national authority over the militias was necessary to ensure more national uniformity in arms, discipline and training. *Id.* at 21.

The Anti-Federalists raised three concerns. First, they were concerned that the national government might take control of the states' militias and use them to oppress the states. *Id.* at 22. Second, they were concerned that if the national government were given the authority to arm, discipline and train the militias, then Congress might neglect the militias, thereby rendering them useless to the states. *Id.* Finally, the Anti-Federalists were concerned that the states would not have concurrent authority to arm, discipline and train their own militias if Congress were to neglect them. *Id.*

The concerns of the Anti-Federalists were addressed in the final constitutional distribution of militia power. The national government was given the power to organize, arm, discipline and call forth the militia. U.S. CONST. art. I., § 8, cls. 15, 16. The states were given the power to appoint officers for and train the militia. *Id.* cl. 16; Ehrman & Henigan, *supra* note 12, at 23.

62. This unsatisfactory relationship is reflected in the constitutional text. *See* U.S. CONST. art. I, § 8, cls. 15, 16; *see also supra* text accompanying notes 18-19.

63. *See, e.g.*, Levinson, *supra* note 2, at 648-49, 652 (arguing Madison's desire for an extended republic in which all Americans possessed arms supports broad, individual right to keep and bear arms); Lund, *supra* note 2, at 107 n.9 (arguing Madison's original plan to insert each provision of Bill of Rights into appropriate section of Constitution supports "individual interpretation" of Second Amendment, since Madison intended to insert right to keep and bear arms provision into Article I, § 9, "which is the principal 'individual rights' section of the original Constitution."); *cf.* Ehrman & Henigan, *supra* note 12, at 32 ("Congress did not intend to confer a broad 'individual' right to carry arms . . . . [I]f Madison and Congress had intended to create some broad individual right to weapons, they could have chosen language which clearly did so.").

being armed" over the "kingdoms of Europe[,] . . . [whose] governments are afraid to trust [their] people with arms."[64] However, this passage must be considered in its larger context, namely, Madison's belief that the proposed federal government could not possibly accumulate a large enough standing army to establish an oppressive tyranny over the people:

> Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government: still it would not be going too far to say that the State governments with the people on their side would be able to repel the danger. The highest number to which . . . a standing army can be carried in any country does not exceed one hundredth part of the whole number of souls; or one twenty-fifth part of the number able to bear arms. This proportion would not yield, in the United States, an army of more than twenty-five or thirty thousand men. To these would be opposed a militia amounting to nearly half a million citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties and . . . united . . . and conducted by governments possessing their affections and confidence [the states]. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops . . . . Besides the [individual American's] advantage of being armed, . . . the existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition . . . .[65]

Madison actually was suggesting that the "advantage" of Americans being armed was that individual Americans may, if necessary, exercise their right to keep and bear arms in order to erect a barrier against any enterprises of federal ambition that would establish a tyranny over the people.[66]

Alexander Hamilton's writings in *The Federalist* also support the theory of a conditional, individual right to keep and bear arms.[67] Hamilton wrote extensively about the necessity of standing armies and the alleged risks they posed to the state militias.[68] Specifically, Hamilton addressed the issue whether adequate constitutional provisions had been made against the existence of standing armies in peacetime.[69]

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64. THE FEDERALIST No. 46, at 321 (James Madison) (Jacob E. Cooke ed., 1961).

65. *Id.* at 321-22.

66. *Id.*

67. *See id.* Nos. 24-29 (Alexander Hamilton). Commentators rarely cite Hamilton on the Second Amendment. Yet, Hamilton's writings on the relationship between the proposed federal standing army and the states' militias provide important insight into the constitutional concerns that gave rise to the adoption of the Second Amendment. *See id.*

68. *See id.*

69. *Id.* No. 24, at 152 (Alexander Hamilton); *see* U.S. CONST. art. I, § 8, cls. 12-13

Hamilton first argued that the use of standing armies for the defense of the nation's western border was more practical than reliance on the state militias. He observed that "[p]revious to the [American] Revolution, and ever since the peace, there has been a constant necessity for keeping small garrisons on our Western frontier."[70] He reasoned that standing armies proportionate to the risk of disturbance were necessary, because protection of the frontier was a permanent military obligation, and "[t]he militia would not long . . . submit to be dragged from their occupations and families to perform that most disagreeable duty in times of profound peace."[71]

Later, Hamilton argued that standing armies would ensure a more effective defense of the nation: "[C]ases are likely to occur under our government . . . which will sometimes render a [standing army] essential to the security of the society . . . ."[72] Because war is a "science" that is acquired and perfected only through diligence, perseverance, time and practice, a war conducted against "a regular and disciplined [foreign] army can only be successfully conducted by a force of the same kind," namely, a standing army.[73]

Hamilton's emphasis on the practical and "scientific" benefits of standing armies over militias made reliance on the English common-law justification for an individual right to arms, i.e., defense of the country from foreign invasion, an implausible justification for an *American* individual right to keep and bear arms. He explained the justification for a conditional, individual right to keep and bear arms in the new nation. If ever the federal government should conspire to "subvert the liberties" of the people through the use of a large, standing army,[74]

> there is then no resource left but in the exertion of that original right of self-defense which is paramount to all positive forms of government, and which against the usurpations of the national rulers [the citizens may take up arms] with infinitely better prospect of success than against those of the rulers of an individual [s]tate.[75]

Hamilton argued that the best protection against a standing army

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("Congress shall have Power . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years [and] . . . . Congress shall have Power . . . To provide and maintain a Navy[.]"); *see also supra* text accompanying notes 18-19.

70. THE FEDERALIST No. 24, at 161 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

71. *Id.*

72. *Id.* No. 25, at 167.

73. *Id.* at 166.

74. *Id.* No. 26, at 172.

75. *Id.* No. 28, at 180.

is the individual citizen's right to keep and bear arms. However, this individual right is conditioned upon the rare need of citizens to defend themselves against federal government attempts to subvert individual liberties and establish a tyranny.[76]

When taken in proper context, the writings of Madison and Hamilton reflect the Framers' predisposition to create a conditional, individual right to keep and bear arms. The evolution of the ideas expressed by Madison and Hamilton in *The Federalist* continued through the Second Amendment's ratification.

3. *Ratification of the Second Amendment.* If the Congress had intended to convey a broad individual right to keep and bear arms, then it could have used language that expressly conveyed such a broad right.[77] But Congress had no such intention.[78] Instead, the final version of the Second Amendment was the product of three distinct state models which, when combined, created a conditional, individual right to keep and bear arms.

James Madison studied each of the twelve state constitutions before drafting the federal Bill of Rights.[79] The Second Amendment was the product of three state models, exemplified by the arms provisions in the Virginia, Pennsylvania and Massachusetts Declarations of Rights.[80]

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76. *See id.* No. 29, at 185.

77. Ehrman & Henigan, *supra* note 12, at 32. Indeed, the Second Amendment might have used the following language to create a broad individual right: "The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the [Congress] from defining the lawful use of arms." *See* UTAH CONST. art. I, § 6. Even though the Utah legislature retains the power to define the lawful use of arms, the Utah Constitution expressly conveys an *individual* right to keep and bear arms not only for the "security . . . of . . . the State;" but also for the defense of persons and property. *Id.*

The West Virginia Constitution provides that "[a] person has the right to keep and bear arms for the defense of self, family, home and state, and for *lawful hunting and recreational use.*" W. VA. CONST. art. III, § 22 (emphasis added). Significantly, none of the conventions, debates or other writings preceding the ratification of the Second Amendment discuss a right to have weapons for self-defense, hunting or recreational use. Ehrman & Henigan, *supra* note 12, at 33.

78. *See* Ehrman & Henigan, *supra* note 12, at 31-34.

79. *Historiography*, *supra* note 1, at 47 (citing IRVING BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION 264 (1950)). Madison's role as "father of the national bill of rights" was much more an editing role than a drafting role. *Id.* at 53. On a macro-level, Madison's responsibility was first to select a "hard core" of usable proposals from the hundreds of redundant, even questionable proposals; second, to single out the most desirable proposals; and finally, to assemble the proposed rights into a series of amendments. *Id.* On the micro-level, Madison had the same responsibility as to each amendment. *See id.* at 54-59.

80. *See* Ehrman & Henigan, *supra* note 12, at 15-17; *Historiography*, *supra* note 1, at 33. Of course, each of the twelve original state constitutions had an important influence on

The Virginia legislature rejected Thomas Jefferson's proposal to create a broad individual right to arms.[81] Instead, the legislature adopted George Mason's more conservative proposal, which provided:

> *[A] well-regulated Militia, composed of the body of the people, trained to arms, is the proper, natural and safe defence of a free State*; that Standing Armies, in time of peace, should be avoided as dangerous to liberty; and that, in all cases, the military should be under strict subordination to and governed by the civil power.[82]

Significantly, this militia-based provision does not provide for an individual right to arms, but focuses on the necessity of a "well-regulated militia" and proscribes standing armies in peacetime.[83]

Even though the Pennsylvania Declaration was heavily influenced by the Virginia model,[84] the Pennsylvania legislature gave greater scope to individual rights than its Virginia counterpart.[85] Specifically, Pennsylvania departed from the Virginia model in adopting the nation's first arms provision.[86] The Pennsylvania Declaration provided:

> *[T]he people have a right to bear arms for the defense of themselves and the state*; and as standing armies in times of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.[87]

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the final language of the Second Amendment. Ehrman & Henigan, *supra* note 12, at 15-16. The Virginia, Pennsylvania and Massachusetts constitutions, however, contain the prototypical arms provisions on which the amendment was based. *Historiography*, *supra* note 1, at 33.

81. *See Historiography*, *supra* note 1, at 34 ("[Jefferson's] proposal did not mention the militia or its role in a republic, but did include a clearly individual right to arms: 'No freeman shall ever be debarred the use of arms.' ").

82. Ehrman & Henigan, *supra* note 12, at 16 (quoting Virginia Declaration of Rights, art. 13) (emphasis added).

83. Conversely, Jefferson's proposal did not mention the militia or its necessity for the security of the nation. *Historiography*, *supra* note 1, at 34.

The Virginia model resembles closely the Militia Clause of the Second Amendment. If the Second Amendment were based solely on the militia-based Virginia model, then the position of state's right theorists would be strengthened, since the Virginia model does not mention an individual right to arms. *See supra* part I.

84. *See* JOHN ADAMS, 2 DIARY AND AUTOBIOGRAPHY 391 (L.H. Butterfield ed., 1961) ("[The Pennsylvania] Bill of Rights is almost verbatim from that of Virginia."); Ehrman & Henigan, *supra* note 12, at 16-17 (recognizing that except for arms provision, Pennsylvania Declaration virtually is taken verbatim from Virginia model). Indeed, the Pennsylvania drafters studied copies of the Virginia Declaration before drafting their own state's declaration. *Historiography*, *supra* note 1, at 38.

85. *Historiography*, *supra* note 1, at 38.

86. Ehrman & Henigan, *supra* note 12, at 16.

87. *Id.* at 17 (quoting Pennsylvania Declaration of Rights, art. XIII)(emphasis added).

Unlike the Virginia model, this provision expressly establishes an individual right to bear arms for defense of persons and the state.[88] Moreover, the Pennsylvania legislature chose not to recognize the necessity of a "well-regulated Militia" for the "safe defence of a free State."[89]

Even though the Massachusetts Declaration also was influenced by the Virginia model,[90] the Massachusetts legislature took the Virginia model one step further. The legislature combined Virginia's militia-based provision with its own modified individual-right provision in order to create a conditional, individual right. The Massachusetts Declaration provided that "[t]he *people* have a right to keep *and* to bear arms for the *common defence*."[91] Thus, the Massachusetts model not only expanded upon the language of the Philadelphia Declaration, by providing for an individual right to "keep" as well as to "bear" arms; but also conditioned the individual right on the need for a militia to ensure "the common defense" and "private self-defense."[92]

Madison considered the Virginia, Pennsylvania and Massachusetts models in drafting the Second Amendment. In so doing, Madison selected neither the militia-based Virginia model nor the individual-right model. Instead, he settled on language consistent with, if not wholly based upon, the hybrid Massachusetts model: "A well regulated militia, being necessary to the security of a free State [Virginia militia-based model], the right of the people to keep and bear arms, shall not be infringed [Pennsylvania individ-

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88. *Id.*

89. *See* Ehrman & Henigan, *supra* note 12, at 16 (quoting Virginia Declaration of Rights, art. 13). For a discussion of the political and philosophical differences among Virginia's "Harringtonians," Pennsylvania's "Radicals" and the Jeffersonian model of universal suffrage, see *Historiography*, *supra* note 1, at 34-39.

90. *Historiography*, *supra* note 1, at 40.

91. *Id.* at 41 n.173 (quoting MASS. CONST. pt. I, art. XVII) (emphasis added).

92. *Id.* at 40-41. The writings of John Adams, chief author of the Massachusetts Declaration, reflect his belief in the need for an individual, but "qualified," or conditional, right to keep and bear arms:

> To suppose arms in the hands of citizens, to be used at individual discretion, *except in private self-defence*, or by partial orders of towns, countries or districts of a state, is to demolish every constitution, and lay the laws prostrate, so that liberty can be enjoyed by no man; it is a dissolution of the government. The fundamental law of the militia is, that it be created, directed and commanded by the laws, and ever for the support of the laws.

6 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 197 (Charles F. Adams ed., 1851), *quoted in Historiography*, *supra* note 1, at 41 (emphasis added). Hence, Adams sought to define at once the breadth of the individual right to keep *and* bear arms, and the scope of such right, namely, for "the common defense" and "private self-defense." *See Historiography*, *supra* note 1, at 41-42.

ual-right model]."[93]

B. *The Plain Meaning of the Second Amendment*

The Second Amendment's historical context demonstrates that the right to keep and bear arms is a narrow individual right that is conditioned on the necessity of a militia to the security of a free state. Even though "bright boundary lines cannot always be drawn,"[94] analysis of the Second Amendment's language is required to explain the scope of the individual right.[95]

1. *"Militia."* George Mason provides the eighteenth-century understanding of the term "militia": "I ask, Who are the militia? They consist now of *the whole people*, except a few public officers."[96] The militia was not a select military force[97] but the entire adult male citizenry, who were allowed and often required to possess and carry their own arms for the security of the state.[98]

This inclusive interpretation of the term "militia" is further supported by the language of the first national militia act.[99] The act defined the militia broadly to include all able-bodied, white male citizens ages eighteen to forty-five.[100] Even though the defini-

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93. U.S. CONST. amend. II.

94. *Guarantees to Arms*, *supra* note 14, at 59 & n.5, 60.

95. *See Historiography*, *supra* note 1, at 42.

96. 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 386, *quoted in Guarantees to Arms*, *supra* note 14, at 63 (emphasis added). Mason's understanding was consistent with the prevailing view in seventeenth-century England. Ehrman & Henigan, *supra* note 12, at 11.

97. As Mr. Kates argues, the Framers' eighteenth-century understanding of the term "militia" undercuts the state's right theory of the Second Amendment:

> The . . . argument against an individual right [to keep and bear arms] states that the [A]mendment uses "militia" in the sense of a formal military force separate from the people. But this is plainly wrong. The Founders stated what they meant by "militia" on various occasions. Invariably they defined it in some phrase like "*the whole body of the people*," while their references to the organized-military-unit usage of militia, which they called a "select militia," were strongly pejorative.

Kates, *supra* note 1, at 216 (footnotes omitted) (emphasis added).

Since one purpose of the Second Amendment was to arm the "militia," the Framers guaranteed the right to keep and bear arms to all those comprising the militia, namely, all able-bodied males. *Id.* at 216-17; *see* Weatherup, *supra* note 16, at 992 (noting that Madison himself used the terms "militia" and "people" synonymously).

98. *Guarantees to Arms*, *supra* note 14, at 63-68; Ehrman & Henigan, *supra* note 12, at 11; Kates, *supra* note 1, at 214, 216-17; Lund, *supra* note 2, at 106 & n.6; *cf.* Ehrman & Henigan, *supra* note 12, at 24 ("[I]n the context of the Constitution, the militia was viewed as a state-organized, state-run body; it was not simply a term for the citizenry at large.").

99. First Militia Act, ch. 29, 1 Stat. 271 (1792); *see* Ehrman & Henigan, *supra* note 12, at 35-36; *Historiography*, *supra* note 1, at 27; Kates, *supra* note 1, at 216.

100. Section 1, 1 Stat. at 271; Ehrman & Henigan, *supra* note 12, at 35; Kates, *supra*

tion was narrowed by the second militia act,[101] the language of the first militia act reflects the Framers' original understanding of the term "militia."

Moreover, the original understanding renders the state's right theory questionable.[102] The Framers believed that a militia—"the whole of the people," possessed of their *individually*-owned arms—was necessary for the security of a free state, and guaranteed the right to keep and bear arms not to the state, but to all qualified individuals.[103] This individual right was subject to the qualification of the phrase preceding "militia" in the Second Amendment: "well regulated."[104]

2. *"Well Regulated."* For the Framers in the eighteenth century, a "well regulated" militia meant one "properly disciplined," not "government controlled."[105] The Framers recognized that even

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note 1, at 216. The Act also required each militiaman to possess his own arms. Section 1, 1 Stat. at 271; *Historiography*, *supra* note 1, at 27 ("[The] Act required [each militiaman] to possess a rifle or musket (or, if enrolled in cavalry or artillery units, pistols and a sword) . . . .").

101. The Dick Act, ch. 196, 32 Stat. 775 (1903). In contrast to the First Militia Act's definition of militia, the Dick Act provided for a militia that consisted of less than all able-bodied, military-age males. *Id.* § 3; Ehrman & Henigan, *supra* note 12, at 37. Nevertheless, the Supreme Court has adopted the original understanding of the term "militia" as reflected in the First Militia Act. *See* U.S. v. Miller, 307 U.S. 174, 179 (1939). For a discussion of *Miller* and judicial interpretation of the Second Amendment, *see infra* part III.C.2.

102. *See supra* part II.A.; *see also supra* text accompanying notes 16-27.

103. *See* Kates, *supra* note 1, at 217-18. Significantly, nothing in the history or language of the Second Amendment indicates that the Framers intended to extend the right to keep and bear arms to women.

104. U.S. CONST. amend. II.

105. Lund, *supra* note 2, at 107 & n.8. As Lund argues:

> The fact that the Framers referred to a "well regulated militia" lends apparent support to the collective right interpretation [of the Second Amendment], but the reference indicates only that the Framers intended for the militia to be regulated in some way, as for example, by being organized into formal military units *or* by being comprised of *individuals* already familiar with the principal instruments of military combat.

Id. at 107 (emphasis added) (footnote omitted). Thus, the plain language of the Second Amendment does not imply merely a "right of the states to maintain organized military forces," *id.* at 105, but an individual right to arms which, in turn, requires some degree of regulation.

For further analysis of the "collective," or state's right theory of the Second Amendment, see *supra* part I.A and text accompanying note 37; *see also* Ehrman & Henigan, *supra* note 12, at 21-22 (observing that "the Federalists frequently tried to turn Anti-Federalist fears about [a standing] army around, arguing that by . . . maintaining a well-disciplined, uniformly trained, and effective militia, Congress would have less need to raise a large standing army"). For a discussion of the risks posed by a standing army, see *supra* part II.A.2.

if the militia were comprised of all able-bodied male citizens,[106] arms and organization were necessary in order to fulfill the central purpose of the Second Amendment: to ensure the security of a free state.[107] In his first annual address, President George Washington argued that "[a] free people ought not only to be armed, but disciplined; to which end a uniform and well-digested plan is requisite."[108] The Framers' intention to discipline the militia is manifest

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106. *See supra* part II.B.1.

107. *See Guarantees to Arms*, *supra* note 14, at 23-24. As one delegate explained at the Constitutional Convention: "[B]y *organizing*, the Committee meant proportioning the officers and men—by *arming*, specifying the kind, size, and calibre of arms—and by *disciplining*, prescribing the manual exercise, ..." *Historiography*, *supra* note 1, at 26 & n.102 (citing 5 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 344 (2d ed., 1836) (1966)).

It might be argued that since the Framers intended a properly *disciplined* militia, *see supra* text accompanying note 97, the Second Amendment was intended not to provide an individual right to keep and bear arms, but rather a right of the states to strictly organize their own militias in order to defend the nation from external attack.

Such an argument fails for two reasons. First, the Framers already had provided in Article I, § 8 of the Constitution for the national defense. Specifically, the Framers had provided Congress with the power "[t]o raise and support Armies," U.S. CONST. art. I., § 8, cl. 12; "[t]o provide and maintain a Navy," *id.* at cl. 13; "[t]o make Rules for the Government and Regulation of the land and naval Forces," *id.* at cl. 14; "[t]o provide for calling forth the Militia," *id.* at cl. 15; and "[t]o provide for organizing, arming, and disciplining, the Militia, . . . reserving to the States respectively, . . . the Authority of training the militia according to the discipline prescribed by Congress," *id.* at cl. 16. *See supra* text accompanying notes 18-19. Since the Framers already had provided in the Constitution for the national defense and the states' authority to train the militia under Congressional authority, similar provisions in the Second Amendment would have been superfluous.

Second, as Mr. Hardy argues:

> Provisions authorizing Congress to provide for the arming and organizing of the *national* militia were seen as allowing it to require that *all* citizens possess arms of uniform caliber and conform to a standard of drill. In practice, while various administrations prepared detailed plans along these lines, Congress refused to enact them.

Historiography, *supra* note 1, at 26 & n.103 (emphasis added) (footnotes omitted). If Congress had intended the phrase "well regulated" in the Second Amendment to mean strictly organized, armed and disciplined by the states, then one might expect that Congress would have enacted the necessary provisions. The fact that Congress did not enact such provisions suggests that the Second Amendment was intended not to provide a right of the states to organize their own militias, but rather to provide an individual right to keep and bear arms.

For discussion of the meaning of the phrase "security of a free state" in the Second Amendment, see *infra* part II.B.3.

108. George Washington, First Annual Address (Jan. 8, 1790), *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 57 (James D. Richardson ed., 1897). Indeed, Washington considered militia legislation to be "an object of primary importance[,] whether viewed in reference to the national security[,] to the satisfaction of the community or to the preservation of order." George Washington, Third Annual Address (Oct. 25, 1791), *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 99 (James D. Richardson ed., 1897); *see Historiography*, *supra* note 1, at 26.

in the provisions of the First Militia Act of 1792, which required all able-bodied males of military age to individually possess arms.[109]

Thus far, analysis of the Second Amendment's plain meaning suggests that a "well-regulated militia" is all able-bodied, white male citizens ages eighteen to forty-five,[110] possessed of arms and "properly disciplined,"[111] " 'especially when young, [on] how to use them.' "[112] A "well-regulated militia" was intended to ensure "the security of a free state."[113] The plain meaning of this latter phrase reveals the central purpose of the Second Amendment.

3. *"The Security of a Free State".* The central purpose of the Second Amendment was to ensure that individual citizens would be privately armed in order to "constitute a reasonable deterrent" against federal government "attempts to institute a repressive political regime."[114]

Anti-Federalists feared[115] not only the prospect of a standing army,[116] but also "the proposed transfer of state authority over the militia."[117] Since the anti-Federalists believed that disarmament of the civilian population was the prerequisite for government's op-

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109. *See supra* text accompanying notes 97-98; Lund, *supra* note 2, at 107.

110. *See supra* part II.B.1.

111. *See supra* text accompanying notes 115-18.

112. *Historiography*, *supra* note 1, at 51 (quoting RICHARD H. LEE, LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 124 (Walter H. Bennet ed., 1978)).

113. U.S. CONST. amend. II.

114. Ehrman & Henigan, *supra* note 12, at 24 ("[T]he [S]econd [A]mendment is aimed at ensuring that all private citizens would be armed, and thus able to rise up in revolt against any government action perceived by the masses as 'tyrannical.' " (footnote omitted); Lund, *supra* note 3, at 122 ("The Second Amendment at least gives individuals a constitutional right to keep such private arms as will enable then to constitute a *reasonable deterrent against government attempts to institute a repressive political regime.*") (emphasis added). *See Historiography*, *supra* note 1, at 24, 27; Kates, *supra* note 1, at 267-73; Robert E. Shalhoupe, *The Armed Citizen in the Early Republic*, LAW & CONTEMP. PROBS., Winter 1986, at 125, 133 [hereinafter *Armed Citizen in the Early Republic*].

For discussion of the plain meaning of the word "arms" in the Second Amendment as that term defines the scope of a "reasonable deterrent," see Lund, *supra* note 2, at 122; *see infra* part II.B.6.

115. As Mr. Hardy argues, the fear of an oppressive federal government, and the belief in the need for a well-regulated militia in order to prevent tyranny, dates back to pre-revolutionary America: "[t]o Harrington, an army was too unstable to support any government; to Neville, it was so stable as to support a *tyrannical* one; to *many* colonists, it was capable of corrupting a republican government into a *tyranny*." *Historiography*, *supra* note 1, at 24 (emphasis added).

116. *See supra* part II.A.2.

117. Ehrman & Henigan, *supra* note 12, at 21. *See* U.S. CONST. art. I, § 8, cls. 12-16; *see* ELLIOT, *supra* note 107, at 440; *see also supra* text accompanying notes 18-19.

pression of the people,[118] they viewed the militia "as the means for defending themselves from an oppressive federal government, particularly one which was providing itself with means to establish an army."[119]

Federalists shared the concerns of the anti-Federalists.[120] James Madison and Alexander Hamilton both argued that a "well regulated militia" effectively would ensure "the security of a free state" by preventing a federal tyranny.[121]

James Madison, writing in *The Federalist*,[122] argued that the federal government could not possibly accumulate a large enough standing army to establish a tyranny over the people. Even though a "regular army, fully equal to the resources of the country," and "entirely at the devotion of the federal government," would be formed;[123] the "[s]tate governments with the people on their side would be able to repel the danger."[124] Indeed, the militia, "fighting for their common liberties[,] . . . united . . . conducted by [state] government possessing their affections and confidence . . . could [n]ever be conquered by such a proportion of regular troops."[125] Madison ultimately argued that the American "advantage of being armed" was that individuals may, if necessary, exercise their right to keep and bear arms in order to erect a "barrier" against those "enterprises of [federal] ambition" that might establish a tyranny over the people.[126]

Alexander Hamilton also extolled the American advantage of being armed as the means for preventing federal tyranny. If ever the federal government should conspire to subvert the liberties of individual citizens through use of a standing army, "there is . . . no resource left but in the exercise of that original right of self-defense which is paramount to all positive forms of government, and which against the usurpations of the national rulers[,]" individual

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118. *See* Lund, *supra* note 2, at 111-22.

119. Ehrman & Henigan, *supra* note 12, at 21 (citing 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION 384-88 (1974)). *See* U.S. CONST. art. I, § 8, cls. 12-16.

120. *See supra* part II.A.2.

121. *See supra* parts II.B.1 and II.B.2; *see supra* text accompanying note 22.

122. THE FEDERALIST No. 46, at 299 (James Madison) (Clinton Rossiter ed., 1961). Even though *The Federalist* was published nearly four years before the adoption of the Second Amendment, *see supra* text accompanying note 22, the writings of Madison and Hamilton reflect in large part the Framers' belief that the militia would prevent establishment of a federal tyranny through oppressive use of a standing army. *See generally* THE FEDERALIST (Clinton Rossiter ed., 1961).

123. THE FEDERALIST No. 46, at 299 (James Madison) (Clinton Rossiter ed., 1961). *See* U.S. CONST. art. I., § 8, cls. 12-16.

124. THE FEDERALIST No. 46, at 299 (James Madison) (Clinton Rossiter ed., 1961).

125. *Id.*

126. *Id.*

citizens may take up arms.[127]

The central purpose of a well-regulated militia was to ensure the right of individual citizens to defend themselves against any federal government attempt to subvert their liberties through establishment of a tyranny.[128] Thus the Framers expressly conditioned the individual right to keep and bear arms on the need to ensure the "security of a free state,"[129] i.e., *to prevent the establishment of a federal tyranny.*

The Second Amendment rule might be stated as follows: where one keeps and bears arms specifically in order to defend oneself against federal government attempts to establish a tyranny, the Second Amendment protects one's conduct. Otherwise, one's conduct is not constitutionally protected and may be more strictly regulated.

4. *"Right*[130] *of the People."* The "right of the people" in the Second Amendment is guaranteed to all individual citizens; it is not a collective right guaranteed to the sovereign citizenry.[131] Analysis of the language of the Bill of Rights and the Militia Clause supports this interpretation.[132]

The language of the Bill of Rights supports the conclusion that "people" in the Second Amendment refers to individual citizens. The First Amendment, for example, provides that "Congress shall make no law . . . abridging . . . the right of the *people* peaceably to assemble . . . ."[133] This Amendment guarantees an individual right, since "it would approach the frivolous to read the assem-

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127. *Id.* No. 26, at 172 (Alexander Hamilton); *id.* No. 28, at 180.

128. *See* U.S. CONST. amend. II; THE FEDERALIST No. 29, at 185 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

129. U.S. CONST. amend. II.

130. The term "right" in the Second Amendment is the only term that has not generated controversy. Since the meaning of the term "right" is no more ambiguous in the Second Amendment than in any other Constitutional provision, its meaning will not be discussed here.

However, this Comment does argue that the individual right of the Second Amendment is expressly limited by the plain language of the Militia Clause. *See supra* parts II.B.1-3.

131. *Historiography*, *supra* note 1, at 4, 57, 59 (arguing that "people" in Second Amendment guarantees individual right to own and carry arms); Kates, *supra* note 1, at 218 (arguing that "people" in First, Second, Fourth, Ninth and Tenth Amendments, refers to individuals, not collective sovereign citizenry); Levinson, *supra* note 2, 645-46 (arguing that text of Bill of Rights itself supports conclusion that "people" refers to individuals); Lund, *supra* note 2, at 107 (arguing that "people" refers to individuals, not collective right of states to have militias); *cf.* Cress, *supra* note 9, at 31 (arguing that "people" refers to collective right of people as sovereign citizenry); O'Donnell, *supra* note 35, at 503-04 (arguing that "people" likely refers to collective, not individual right).

132. *See supra* parts II.B.1-3.

133. U.S. CONST. amend. I.

bly and petition clause as referring *only* to the right of state legislatures to meet and pass a remonstrance directed to Congress or the President against some governmental act."[134]

The Fourth Amendment provides a "right of the *people* to be secure in their persons, houses, papers and effects . . . ."[135] This Amendment also guarantees an individual right, since it ensures that the privacy of individuals will not be violated except where a search or seizure is reasonable or a warrant is supported by probable cause.[136] The Ninth Amendment, which provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the *people*,"[137] also uses the word "people" in the "natural," individual sense.[138]

The Tenth Amendment provides that "[t]he powers not delegated to the United States . . . are reserved to the States . . . or to the *people*."[139] As Professor Levinson argues, the interpretation of this Amendment's language is somewhat "trickier:"[140]

> Concededly, it would be possible to read the Tenth Amendment as suggesting only an ultimate right of revolution by the collective people should the "states" stray too far from their designated role of protecting the rights of the people. This reading flows directly from the social contract theory of the state. (But, of course, many of these rights are held by *individuals*).[141]

Even if the Tenth Amendment directly reserves only collective rights of the people, the Amendment reserves an individual right, since the right is held collectively by all individuals.[142] Moreover, since the Tenth Amendment "explicitly differentiate[s] between 'states' and 'the people' in terms of retained rights,"[143] the Amendment likely reserves rights to both the states and individuals.[144]

Since the term "people" guarantees individual rights in the First, Fourth, Ninth and Tenth Amendments, the Framers likely used the term similarly in the Second Amendment to guarantee the right to keep and bear arms to all individual citizens. Otherwise, an incongruous textual proposition must be adopted: The Framers used the term "people" in the First, Fourth, Ninth and

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134. Levinson, *supra* note 2, at 645.
135. U.S. CONST. amend. IV (emphasis added).
136. *Id.*
137. *Id.* amend. IX (emphasis added).
138. Kates, *supra* note 1, at 218; *see* Levinson, *supra* note 2, at 645.
139. U.S. CONST. amend. X (emphasis added).
140. Levinson, *supra* note 2, at 645.
141. *Id.* (emphasis added).
142. *Id.*
143. *Id.*
144. *See* U.S. CONST. amend. X.

Tenth Amendments to mean *individual* citizens, but used the same phrase in the Second Amendment to mean either a *collective* right of the sovereign citizenry to arms, or a right of the *states* to have organized military units. If the Framers had intended the latter, then they would have used specific language to describe such a right.[145]

The language of the Militia Clause also supports the conclusion that the term "people" refers to individual citizens.[146] The purpose of the Militia Clause was to ensure that all able-bodied individuals (the "militia") possessed arms and were properly disciplined ("well regulated") on how to use them, so that they might defend against any federal government attempt to subvert individual liberties through establishment of a tyranny ("the security of a free state").[147] Since "militia" actually means all able-bodied individuals, not an organized military unit,[148] the term "people" in the Right to Arms Clause also refers to individuals. Since "well regulated" means properly disciplined on how to use arms, not government controlled,[149] the Framers contemplated that the "people" would individually possess and use arms. And, since the purpose of the Second Amendment was to ensure the right of individual citizens to defend against federal tyranny, the "people" individually must have the right to keep and bear arms.[150]

The plain meaning of the phrase "right of the people" in the Second Amendment reflects the Framers' intention to guarantee an individual, not collective, right to keep and bear arms. By "keep and bear," the Framers meant that two distinct forms of conduct shall not be infringed.

5. *"Keep and Bear."* The Framers guaranteed individuals the right not only to "bear" arms when defending against federal tyranny, but also to "keep" arms when defense was unnecessary.[151] The Pennsylvania individual right model supplied the right to *bear*

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145. *See supra* text accompanying note 17. For example, the Framers might have provided for the *collective* right of the people to keep and bear arms. The Framers also might simply have adopted the militia-based Virginia model as the Second Amendment. *See supra* part II.A.3.

146. *See supra* parts II.B.1-3.

147. *See supra* parts II.B.1-3.

148. *See supra* part II.B.1.

149. *See supra* part II.B.2.

150. *See supra* part II.B.3. Notwithstanding that the term "people" means individuals, nothing in the history of the Second Amendment suggests that ownership of arms must extend to ex-convicts, the mentally impaired or minors. *See* Kates, *supra* note 1, at 210.

151. *See supra* part II.A.3.

arms,[152] while the hybrid Massachusetts model supplied the right to *keep* arms.[153]

The Framers' use of the phrase "to bear" arms initially supports the "state's right" theory of the Second Amendment.[154] Indeed, "contemporary statutory usage shows eighteenth-century writers using 'bear' [only] in reference to militiamen carrying their arms when mustered to duty[] . . . ."[155] Thus, if the Framers had used only the phrase "to bear," the Second Amendment would "protect the carrying of arms outside the home only in the course of militia service."[156]

As Mr. Kates observes:

> [c]olonial statutes did require militiamen to "keep" arms in their homes, but they also required the over-aged, seamen and *others, exempt from militia service* to "keep" arms in their homes . . . . The one context in which "keep" was not used was as a description of arms possession by public agencies (as opposed to individuals) . . . .[157]

The term "keep" does not import a right of the states to have organized militias,[158] nor is it limited to military service.[159] Instead, this term refers to an individual right to possess arms.[160] Thus, one who exercises one's right to "keep" arms also may exercise one's right to "bear" such arms in order to defend herself against federal government attempts to establish a tyranny.[161]

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152. *See supra* part II.A.3; Ehrman & Henigan, *supra* note 12, at 17 (quoting PENN. DECL. OF RIGHTS, art. XIII); *Historiography*, *supra* note 1, at 52, 56.

153. *See Historiography*, *supra* note 1, at 40, 56 n.173 (quoting MASS. CONST. pt. I, art. XVII). The Massachusetts Constitution guaranteed the right "to keep and to bear arms" *Id.*; *see supra* part II.A.3.

154. Kates, *supra* note 1, at 219 (discussing the argument put forth by Professor Levin); *see supra* part I.A.

155. Kates, *supra* note 1, at 219; *see* John Smith, The Constitutional Right to Keep and Bear Arms 42-55 (1959) (unpublished thesis, Harvard Law School) (arguing extensive statutory review indicates "bear" generally did refer to carrying of arms by militiamen); John Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 CHI.-KENT L. REV. 148 (1971).

156. Kates, *supra* note 1, at 219.

157. *Id.* (quoting Smith, *supra* note 155, at 49 (emphasis added) (footnote omitted)).

158. As Mr. Kates argues:

> If the Framers' only concern had been to protect the militia's right to have arms when actually mustered, "to bear" would have sufficed. The words "to bear" take on meaning only if what is being protected is the *individual's own arms*, rather than those arms of the state that would be dispensed to him from an armory whenever the militia was mustered.

Id. at 220 (emphasis added) (footnote omitted).

159. *Id.*

160. *Id.*

161. *See* U.S. CONST. amend. II (providing the right to keep *and* bear arms); *see supra*

The phrase "keep and bear" in the Second Amendment refers to the individual right not only to possess ("keep") arms, but also to carry and use ("bear") such arms. The last five words of the Second Amendment[162] suggest limitations on the conditional, individual right to keep and bear arms.

6. *"Arms."* Little in the Second Amendment's history suggests that the Framers contemplated a specific class of weapons as "arms." Several commentators have seized upon this ambiguity in order to make an important argument: the Framers did not intend for individuals to keep and bear any and all types of weapons as "arms."[163] Nor, however, did the Framers intend an overly restrictive definition of the term "arms." Many of the Framers participated in the enactment of the original Militia Act of 1792,[164] which required able-bodied individuals to possess "a rifle or musket" or, "if enrolled in cavalry or artillery units, pistols and a sword[] . . . ."[165] Thus the Framers intended the term "arms" to included certain basic types of weapons both accessible to individuals at large and adequate for individual self-defense. The modern equivalents of such weapons are handguns and rifles. Both types of weapons essentially were specified in the Act and, today, are readily accessible and adequate for self-defense.

The class of arms that the Framers contemplated might be limited further by implication of the phrase "keep and bear" in the Second Amendment.[166] "Because what is being guaranteed is an individual right to keep *and bear* arms, the arms could only be [borne] if the ordinary individual could conveniently lift and transport them about with his body."[167] Such a limitation is grounded in the specific language of the Second Amendment and eliminates most paramilitary weapons, including bazookas, missiles, flame-

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part II.B.3.

162. U.S. CONST. amend. II ("arms shall not be infringed").

163. *Historiography*, *supra* note 1, at 62 n.270 (arguing that if the militia component of Second Amendment actually had substantive meaning, citizens might have enforceable duty to "purchase and stockpile M-14's, M-16's or any other standard military firearm . . . ."); Kates, *supra* note 1, at 210 (inquiring why all types of arms, including "artillery, flamethrowers, [and] machine guns [are not permitted under the Second Amendment]."); O'Donnell, *supra* note 35, at 503-04 (arguing that if individual right to arms were absolute, the 'logical' conclusion would be that individuals have right to own "machine guns, missiles or whatever 'arms' he or she wishes to possess.").

164. Section 1, 1 Stat. at 271; *see supra* part II.B.1; *see supra* text accompanying notes 109-11.

165. Section 1, 1 Stat. at 271; *see Historiography*, *supra* note 1, at 27.

166. Kates, *supra* note 1, at 220 n.62.

167. *Id.* (emphasis added).

throwers, tanks and planes.[168]

The term "arms" includes basic weapons, such as handguns and rifles, which are accessible to individuals and adequate for individual self-defense. The phrase "keep and bear" further implies that permissible "arms" are those which one could conveniently "bear" on one's person.

7. *"Shall not be Infringed."* Even though the last phrase of the Second Amendment suggests that the individual right to keep and bear arms "shall not (*ever*) be infringed," no right in the federal Bill of Rights is absolute.[169] The language of the Second Amendment limits the individual right to keep and bear arms.

First, the individual right to keep and bear arms is limited by the Militia Clause: "A well regulated militia being necessary to the security of a free state, ..."[170] This language expressly conditions the individual right to keep and bear arms on the necessity for

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168. Concerning paramilitary weapons such as machine guns and other assault weapons, Mr. Lund suggests that "*reasonable* government regulation of firearms is compatible with the intent of the Framers and the language of the Second Amendment." Lund, *supra* note 2, at 130 (emphasis added). Even though a standard of reasonableness would be plausible as a matter of public policy, it has no support in the history or language of the Second Amendment. However, it is equally true that no constitutional right is absolute and, therefore, Congress may limit the individual right to keep and bear arms where a compelling government interest exists.

Recently, the House of Representatives passed a bill which would ban several dozen types of automatic assault weapons. The Senate previously had passed a similar bill. If the President signs a revised bill as expected, such a law probably would be constitutional. Nothing in the history or language of the Second Amendment suggests that the Framers intended to (1) include paramilitary weapons within the scope of the term "arms" in the Second Amendment; or (2) restrict the power of Congress to limit the definition of "arms" in light of a compelling government interest in ensuring public safety.

169. The First Amendment, for example, provides that "Congress shall make *no* law . . . abridging the freedom of speech[] . . . ." U.S. CONST. amend. I. Despite this language, however, the First Amendment right of free speech is not absolute. As Justice Holmes stated for a unanimous Court in Schenck v. United States, 249 U.S. 47 (1919), the "character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a [crowded] theatre and causing a panic." *Id.* at 52

Other rights afforded in the Bill of Rights are similarly limited. For example, the Fourth Amendment provides a right to be secure in one's person, house, papers, and effects against unreasonable searches and seizures, U.S. CONST. amend. IV, but a warrant is not required in exigent circumstances. The Fifth Amendment affords a privilege against self-incrimination, U.S. CONST. amend. V, but evidence inadmissible in the prosecution's case-in-chief may be used to impeach a defendant. And, the Sixth Amendment provides a right to counsel to the accused "[i]n all criminal prosecutions," U.S. CONST. amend. VI, but the right does not extend to pre-custodial interrogations. *See also* Dowlut, *Guarantees to Arms*, *supra* note 14, at 68.

170. U.S. CONST. amend. II.

individuals to defend themselves against federal government attempts to subvert individual liberties through establishment of a tyranny.[171] Second, the individual right is limited by specific terms in the Right to Arms Clause: "[T]he right of the people to *keep and bear arms* shall not be infringed."[172] The phrase "keep and bear" implies that permissible "arms" are only those which one could conveniently "bear" on one's person.[173]

The Supreme Court's Second Amendment doctrine differs from the above interpretation. The Court's two Second Amendment decisions in the nineteenth and twentieth centuries decisions have not endeavored to develop the plain meaning of the Second Amendment.

III. Judicial Interpretation of the Second Amendment

The Supreme Court has decided only four cases involving the Second Amendment in 206 years. The Court's most significant case, *United States v. Miller*,[174] was decided over fifty-five years ago.

A. *Nineteenth Century:* Dred Scott, Cruikshank *and* Presser

Dred Scott v. Sandford[175] is the Supreme Court's only antebellum case that even refers to the Second Amendment.[176] *Dred Scott* held that African-Americans were not citizens of the United States and, therefore, were not entitled to the privileges of citizenship.[177] Writing for the Court, Chief Justice Taney stated that, if the Court were to have held otherwise, African-Americans would have had such rights as those including "the right . . . to keep and carry arms wherever they went."[178] Through this dictum espousing an *argumentum ad horribilis*,[179] the Court suggested that the right to "keep and carry arms" was an individual right that travels with citizens wherever they may go.[180]

The Court repudiated this suggestion twenty years later in

171. For discussion of the plain meaning of the terms of the Militia Clause, see *supra* parts II.B.1-3.

172. U.S. Const. amend. II.

173. *See supra* part II.B.6. For discussion of the plain meaning of the Right to Arms Clause, see *supra* parts II.B.4-7.

174. 307 U.S. 174 (1939).

175. 60 U.S. (19 How.) 393 (1856).

176. Kates, *supra* note 1, at 246.

177. *Dred Scott*, 60 U.S. (19 How.) at 416-17.

178. *Id.* at 417 (emphasis added); O'Donnell, *supra* note 35, at 506.

179. *See* Kates, *supra* note 1, at 246.

180. *Dred Scott*, 60 U.S. (19 How.) at 417; O'Donnell, *supra* note 35, at 506.

United States v. Cruikshank.[181] *Cruikshank* involved two African-American men whose firearms were seized by Louisiana members of the Ku Klux Klan.[182] Even though *Cruikshank* was essentially a civil rights case, the Court discussed the right to keep and bear arms.[183] Chief Justice Waite concluded that an individual right

> is not . . . granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by *Congress*. This is one of the amendments that has no other effect than to restrict the powers of the *national* government.[184]

Since the Second Amendment guaranteed no individual right to arms, no individual right could have been violated.[185]

The Court approvingly cited *Cruikshank* eleven years later in *Presser v. Illinois*.[186] *Presser* involved an Illinois statute that prohibited "any body of men whatever, other than the regular organized volunteer militia of th[e] State, and the troops of the United States . . . [from] drill[ing] or parad[ing] with arms in any city, or town, of [the] State."[187] In rejecting the claim that the statute violated the Second Amendment, the Court reaffirmed that the Second Amendment did not guarantee an individual right to keep and bear arms.[188] Specifically, the Court held that "the [s]tates cannot . . . prohibit the people from keeping and bearing arms, so as to deprive the United States of [its] rightful resource for maintaining the public security, and disable the people from performing their duty to the general government."[189] Thus, "a state [could] not disarm its citizens . . . because . . . they belong to the federal militia[,] and the states are prohibited from disarming the federal militia."[190]

Ignoring the Second Amendment's history and language,[191] the *Cruikshank* and *Presser* Courts held that the Second Amendment did not guarantee an individual right to keep and bear arms. The Court would not hear another Second Amendment case until fifty-

181. 92 U.S. 542 (1875).
182. *Id.*
183. *See* O'Donnell, *supra* note 35, at 506.
184. *Cruikshank*, 92 U.S. at 553 (emphasis added).
185. *Id.*
186. 116 U.S. 252 (1886).
187. *Id.* at 253.
188. *Id.* at 265.
189. *Id.*
190. O'Donnell, *supra* note 35, at 507.
191. *See supra* parts II.A., II.B.

five years later in *United States v. Miller*.[192]

B. United States v. Miller: *The Seminal Case*

Miller involved section 11 of the National Firearms Act of 1934,[193] which imposed various application, registration, stamping and monetary requirements on the transportation of firearms in interstate commerce.[194] Miller and an associate were charged with illegal transportation from Oklahoma to Texas of a "shotgun having a barrel less than 18 inches in length," since they did not possess the requisite stamp-affixed written order for the gun.[195] Miller demurred, alleging in part that the National Firearms Act violated the Second Amendment.[196] The district court sustained Miller's demurrer, holding that section 11 of the Act violated the Second Amendment.[197]

The Supreme Court reversed. Writing for the majority, Justice McReynolds held that

> [i]n the absence of any evidence tending to show that possession or use of a "shotgun having a barrel or less than eighteen inches in length". . . has *some reasonable relationship to the preservation or efficiency of a well regulated militia*, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.[198]

The Court thus conditioned the right to keep and bear arms on the necessity of a "well regulated militia" to the security of a free state.[199]

The Court next stated the purpose of the Second Amendment's right to keep and bear arms: "With obvious purpose to assure the continuation and render possible the effectiveness of such forces the *declaration* [the Militia Clause] and the *guarantee* [the Right to Arms Clause] of the Second Amendment were made."[200] In support of its conclusion, the Court quoted extensively from the session laws of Massachusetts, New York and Virginia, each of which provided for organizing and arming their own state militias.[201] Since each state's session laws required able-bodied *indi-*

192. 307 U.S. 174 (1939).
193. Act of June 26, 1934, ch. 757, 48 Stat. 1236.
194. *Id.*
195. *Miller*, 308 U.S. at 175-76 & n.1.
196. *Id.* at 176.
197. *Id.* at 177.
198. *Id.* at 178 (emphasis added).
199. *Id.*; *see* U.S. CONST. amend. II.
200. *Miller*, 307 U.S. at 178.
201. *Id.* at 180-82.

viduals to purchase, possess and carry their own arms for militia service,[202] Justice McReynolds implicitly conceded that the Second Amendment guarantees an individual right to purchase, possess ("keep") and carry ("bear") arms.

Miller is consistent with the conditional, individual right theory, since *Miller* (1) recognizes an individual's right[203] to keep and bear arms,[204] but (2) conditions the individual right on the necessity of an effective, perpetual and "well regulated militia."[205] However, *Miller* fails to develop the plain meaning of the Second Amendment. If Justice McReynolds had carefully analyzed the history and language of the Amendment, then he might have concluded that: (1) the term "militia" refers to all able-bodied individuals, including Miller,[206] not "[a] body of citizens enrolled for military discipline;"[207] (2) the term "well regulated" means properly disciplined on how to use arms,[208] not government controlled;[209] (3) the phrase "security of a free state" refers specifically to the right of individuals such as Miller to defend themselves against federal government attempts to establish a tyranny,[210] not vaguely to the "continuation and . . . effectiveness" of the militia;[211] (4) the phrase "keep and bear" refers to the right of individuals such as Miller to possess and carry arms,[212] not merely to the right of militiamen to carry their arms when mustered to duty;[213] and (5) the term "arms" includes weapons that are readily accessible, adequate for individual self-defense and capable of being borne on one's person,[214] not merely weapons with a "reasonable relationship to . . . the militia"[215] and, therefore, may also include Miller's sawed-off shotgun.[216]

Since the *Miller* Court did not develop the Second Amend-

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202. *Id.*

203. Actually, *Miller* recognizes the individual's obligation to purchase, keep and bear arms. The term "obligation" is stronger than the term "right," since the former suggests that the individual is required to keep and bear arms, while the latter suggests that the individual has the choice.

204. *Miller*, 307 U.S. at 180-82.

205. *Id.* at 178.

206. *See supra* part II.B.1.

207. *Miller*, 307 U.S. at 178-79.

208. *See supra* part II.B.2.

209. *Miller*, 307 U.S. at 178-79.

210. *See supra* part II.B.3.

211. *Miller*, 307 U.S. at 178.

212. *See supra* part II.B.5.

213. *Miller*, 307 U.S. at 179-82.

214. *See supra* part II.B.6.

215. *Miller*, 307 U.S. at 178.

216. *Id.*

ment's plain meaning, the Court should reexamine *Miller*'s "reasonable relationship" test in light of the Second Amendment's history and language.[217] Up until now, however, the Court has been content to leave Second Amendment interpretation to the circuit courts.

C. *The Second Amendment in the Circuit Courts*

1. Cases v. United States.[218] Three years after the Supreme Court decided *Miller*, Jose Cases Velasquez was indicted for violating section 2(e) of the Federal Firearms Act[219] by transporting a firearm and ammunition in interstate commerce.[220] A jury found him guilty and the District Court for Puerto Rico sentenced him to prison.[221] Cases appealed his conviction, contending, *inter alia*, that the Act was unconstitutional because it infringed the Second Amendment's right of the people to keep and bear arms.[222]

The First Circuit affirmed Cases' conviction. Writing for the court, Judge Woodbury first noted that the act "undoubtedly curtails to some extent the right of individuals to keep and bear arms but it does not follow . . . that it is bad under the Second Amendment."[223] After discussing *Miller*, the court concluded that

> [a]pparently, then, under the Second Amendment, the federal government can limit the keeping and bearing of arms by a single individual as well as by a group of individuals, but it cannot prohibit the possession of arms *which has any reasonable relationship to the preservation or efficiency of a well regulated militia.*[224]

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217. The Court probably will not reexamine the *Miller* decision; indeed, the Court has heard only one Second Amendment case in the fifty-six years since *Miller*. In Lewis v. United States, 445 U.S. 55 (1980), the Court upheld the 1968 Gun Control Act under the Due Process Clause of the Fifth Amendment. *Id.* at 66. In so doing, the Court concluded that the Act's "restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties." *Id.* at 65 n.8. Since the Court cited *Miller* in support of its conclusion, *id.*, *Miller*'s "reasonable relationship" standard is still good law.

218. 131 F.2d 916 (1st Cir. 1942).

219. 15 U.S.C. §§ 901-09 (repealed 1968).

220. *Cases*, 131 F.2d at 919.

221. *Id.*

222. *Id.*

223. *Id.* at 921. Judge Woodbury also stated that "[t]he right to keep and bear arms is *not* a right conferred upon the *people* by the federal [C]onstitution. Whatever rights in this respect the people may have depend upon local legislation; the only function of the Second Amendment being to prevent the federal government . . . from infringing that right." *Id.* (emphasis added). Thus, Judge Woodbury seemed to suggest that the Second Amendment's only purpose was to prevent the federal government from infringing on the states' right to organize their militias.

224. *Id.* at 922; *see also Miller*, 307 U.S. 174, 178 (1939).

Although the *Cases* court followed the *Miller* decision, Judge Woodbury questioned whether "the Supreme Court in [that] case was attempting to formulate a general rule applicable to all cases."[225] The court reasoned that since (1) modern lethal weapons, which the Framers did not contemplate, invariably have military uses; and (2) under *Miller*, "private persons," who are "not present or prospective members of any *military* unit," could possess distinctly military arms having a "reasonable relationship to the preservation or efficiency of a well regulated militia;" each Second Amendment case, "like cases under the [D]ue [P]rocess [C]lause, must be decided on its own facts and the line between what is and what is not a valid federal restriction pricked out by decided cases falling one side or the other of the line."[226] Forty years later, the next major Second Amendment case would involve a small shopping center in the Chicago suburb of Morton Grove.[227]

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225. *Cases*, 131 F.2d at 922.

226. *Id.* (emphasis added). Perhaps Justice Scalia would question Judge Woodbury's decision to adopt a case-by-case approach to Second Amendment analysis:

> For when, in writing for the majority of the Court, I adopt a general rule, and say, "This is the basis of our decision," I not only constrain lower courts, I constrain myself as well. If the next case should have such different facts that my political or policy preferences regarding the outcome are quite the opposite, I will be unable to indulge those preferences; I have committed myself to the governing principle. In the real world of appellate judging, it displays more judicial restraint to adopt such a course than to announce that, "on balance," we think the law was violated here—leaving ourselves free to say in the next case that, "on balance," it was not . . . . Only by announcing rules do we hedge ourselves in.
>
> . . . [W]hen an appellate judge comes up with nothing better than a totality of the circumstances test to explain his decision, he is not so much pronouncing the law in the normal sense as engaging in the less exalted function of fact finding . . . . At the margins, of course, [a determination of fact] can become an issue of law . . . . But when all . . . legal rules have been exhausted and have yielded no answer, we call what remains a question of fact . . . [for which] there is no single "right" answer. It could go either way.

Rule of Law, *supra* note 13, at 1180-81. Borrowing from Justice Scalia's analysis, Justice Woodbury's preference for the "case-by-case" approach over a general rule of law for the Second Amendment leaves room for "personal rule[s]" based on judges' individual "political or policy preferences." *Id.* at 1180, 1182. The *Cases* court, for example, followed the *Miller* decision, which requires that a firearm have a "reasonable relationship to the preservation or efficiency of a well regulated militia." *Cases*, 131 F.2d at 922; *see Miller*, 307 U.S. at 178. However, Judge Woodbury himself suggests that "distinctly military arms, such as machine guns, trench mortars, anti-tank or anti-aircraft guns," are forbidden to private persons, even though these arms seem directly related to the preservation or efficiency of a well regulated militia. In this way, Judge Woodbury seizes upon the ambiguity of *Miller*'s "reasonable relationship" test in order to render a feasible decision as a matter of politics and policy. What remains, however, is the need for a Second Amendment jurisprudence that enables and requires judges to render decisions based on the rule of law, not politics or policy.

227. *See* ELLEN ALDERMAN & CAROLINE KENNEDY, IN OUR DEFENSE 94 (1991) [hereinafter DEFENSE] (discussing Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982)).

2. Quilici v. Village of Morton Grove.[228] When Geoffrey LaGioia applied for a permit to open a gun store in a Morton Grove shopping mall, "people didn't like the idea . . . of a gun shop where children could watch people buy guns and window-shop for guns. This was an all-night convenience food mart; the walls weren't very secure. Anyone could break in and take a whole load of guns."[229] So, on the evening of June 8, 1981, at a public hearing attended by local citizens and imported crowds,[230] covered by *The MacNeil-Lehrer NewsHour* and *Nightline*,[231] Morton Grove's residents spoke. At about 1:30 a.m., by a four-to-two vote, Morton Grove became "the first town in the United States to prohibit the possession of handguns in the home."[232]

The following morning, the media deluge, hate mail and death threats began.[233] But the real threat came from Victor D. Quilici, Esq., a Morton Grove gun owner.[234] Quilici challenged the ordinance under the Second Amendment.[235] The District Court for the Northern District of Illinois held, *inter alia*, that the Second Amendment's right to keep and bear arms was not incorporated into the Fourteenth Amendment and, therefore, was inapplicable to Morton Grove.[236]

The Seventh Circuit affirmed.[237] Writing for the court, Judge

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228. 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

229. DEFENSE, *supra* note 227, at 94 (quoting village attorney Martin Ashman). For a fascinating account of Morton Grove's passage of an ordinance that banned the possession of handguns in the home, see *id.* at 93-103.

230. "The night of the vote, the NRA trucked [people] in by truck, bus, car; American flags [were] all over the place, John Deere hats. It looked like rural America was here." *Id.* at 95 (quoting village trustee Greg Youstra).

231. *Id.*

232. *Id.* at 96. Ordinance No. 81-11 provided that "[n]o person shall possess, in the Village of Morton Grove . . . any handgun, unless the same has been rendered permanently inoperative." *Quilici*, 695 F.2d at 264.

Greg Youstra, who cast the deciding vote, recalled the evening:

> When they mentioned my name, . . . a cheer went up from the outside, like you know, Caesar Augustus. They were all out there saying, "There's no way in the world the guy is going to vote for this thing." And when I said, "I vote for the ordinance," [there were] boos and "You sold us out, you dirty commie." It was unbelievable.

DEFENSE, *supra* note 227, at 96 (alteration in original).

233. DEFENSE, *supra* note 227, at 97.

234. *Id.*

235. *Quilici*, 695 F.2d at 264. Quilici also sued under article I, § 22 of the Illinois Constitution and the Ninth and Fourteenth Amendments to the United States Constitution. *Id.*

236. *Id.* at 265; *see* Quilici v. Village of Morton Grove, 532 F. Supp. 1169 (N.D. Ill. 1981), *aff'd*, 695 F.2d 261 (7th Cir. 1982).

237. *See Quilici*, 695 F.2d at 270.

Bauer rejected Quilici's assertion that *Presser v. Illinois*[238] "supports the theory the [S]econd [A]mendment right to keep and bear arms is a fundamental right which the state cannot regulate . . . ."[239] Judge Bauer could not understand the assertion, since

> the *Presser* decision plainly states that "[t]he Second Amendment declares that it shall not be infringed, but this . . . means no more than it shall not be infringed by *Congress*. This is one of the amendments that has no other effect than to restrict the powers of the *National* government . . . ."[240]

Even though the court held that the Second Amendment was inapplicable to the states, Judge Bauer briefly discussed the Amendment's scope:

> Construing th[e Second Amendment] according to its plain meaning, it seems clear that the right to bear arms is inextricably connected to the preservation of a militia. This is precisely the manner in which the Supreme Court interpreted the [S]econd [A]mendment in *United States v. Miller* . . . . There the Court held that the right to keep and bear arms extends only to those arms which are necessary to maintain a well regulated militia.[241]

Thus, the court concluded that the Second Amendment does not guarantee an absolute right to keep and bear arms. Eleven years later, the Eighth Circuit would decide the circuit courts' last major Second Amendment case.

3. United States v. Hale.[242] After Wilbur Hale was convicted of possession of a machine gun[243] and unregistered firearms,[244] he appealed his conviction on the grounds that, *inter alia*, his indictment violated the Second Amendment right to keep and bear arms.[245] Relying on *Miller*, Hale argued that "the Second Amendment bars the federal government from regulating the particular weapons seized because the weapons are susceptible to military use and are therefore, by definition, related to the existence of 'a well

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238. 116 U.S. 252 (1886).

239. *Quilici*, 695 F.2d at 269.

240. *Id.* (emphasis added).

241. *Id.* at 270 (citation omitted). Referring to *Miller*, the court stated that "the right to keep and bear arms exists only as it relates to *protecting the public security* . . . ." *Id.* (emphasis added). For a discussion of what the "public security" means, see *supra* part II.B.3.

242. 978 F.2d 1016 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 1614 (1993).

243. 18 U.S.C.A. § 922(o) (West Supp. 1992), *cited in Hale*, 978 F.2d at 1017.

244. 26 U.S.C. § 5861(d) (1988), *cited in Hale*, 978 F.2d at 1017.

245. *Hale*, 978 F.2d at 1018.

regulated militia.' "[246]

The Eighth Circuit affirmed the district court's judgment. Writing for the court, Judge Gibson restated the *Miller* rule[247] and observed that "*Miller* simply 'did not hold . . . that the Second Amendment is an absolute prohibition against all regulation of . . . any instrument capable of being used in military action.' "[248] Since Hale failed to prove that his weapons possession was "reasonably related to a well regulated militia," his conviction was affirmed.[249]

Cases, *Quilici* and *Hale* are circuit court landmarks to the vitality of *Presser*'s nonincorporation doctrine and *Miller*'s "reasonable relationship" test. Since the Due Process Clause does not incorporate the Second Amendment, and most private citizens probably cannot show that their firearms bear a reasonable relationship to a well regulated militia, it is necessary to hinge greater protection of the individual right to keep and bear arms on state constitutions and courts.

IV. The Right to Keep and Bear Arms in the States

Several state constitutions offer "refuge" from the Second Amendment's narrow conditional, individual right to keep and bear arms. Over the past two decades, the highest state courts have relied increasingly on state constitutional provisions "to grant greater protection for an individual's rights than is provided by the Federal Constitution."[250]

A. *Judicial Federalism and the States*

When the highest state courts interpret the Federal Constitution, their decisions are always subject to review by the United States Supreme Court.[251] However, when such state courts inter-

246. *Id.*

247. *See supra* part III.B.

248. *Hale*, 978 F.2d at 1019 (quoting United States v. Warin, 530 F.2d 103, 106 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976)). The court briefly discussed the history of state militias, and concluded that the Second Amendment "prevented federal laws that would infringe upon the possession of arms by *individuals* and thus render state militias impotent." *Id.* Thus, the court recognized a conditional, individual right to keep and bear arms for the preservation of state militias and, therefore, "as . . . an implicit check on federal power." *Id.* (citing Ehrman & Henigan, *supra* note 12).

249. *Id.* at 1020 (citing Cases v. United States, 131 F.2d 916 (1st Cir. 1942)).

250. Peter J. Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 Syracuse L. Rev. 731, 732 (1982) [hereinafter *Activism*]; Peter J. Galie, *State Supreme Courts, Judicial Federalism and the Other Constitutions*, Judicature, Aug.-Sept. 1987, at 100 [hereinafter *Federalism*].

251. *See* 28 U.S.C. § 1257(a) (1988); *Activism*, *supra* note 250, at 732.

pret their own state constitutions, "their decisions are supreme, unless their interpretation conflicts with a provision of the Federal Constitution."[252] Thus, if one of the highest state courts interprets one of its provisions in such a way as to grant greater protection for an individual's right than the Federal Constitution provides, that interpretation is not subject to Supreme Court review.[253]

States can practice judicial federalism in any of several ways, but two models are especially noteworthy. First, under the "Equivalence-Plus" model, "state courts will interpret their constitutional provisions to grant greater protection than is forthcoming from the Supreme Court."[254] As the Alaska Supreme Court stated in *Ravin v. State*:[255]

> While we must enforce the minimum constitutional standards imposed on us by the United States Supreme Court[] . . . we are free, as we are under a duty to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.[256]

Second, under the "Non-Equivalent Text" model, state courts will decide cases involving "unique provisions of state constitutions such as explicit rights to privacy, rights to legal access, or right[s] to *bear arms*."[257]

Judicial Federalism is manifest in state supreme courts that afford broader individual liberties under their state constitutions than the Federal Constitution provides.[258] The right to arms is broader under most state constitutions.

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252. *Activism*, *supra* note 250, at 732.

253. *Id.* at 732 & n.6 (citing Oregon v. Hass, 420 U.S. 714 (1975); Cooper v. California, 386 U.S. 58 (1967)).

254. *Federalism*, *supra* note 250, at 102.

255. 537 P.2d 494 (Alaska 1975).

256. *Id.* at 513 (citing Baker v. City of Fairbanks, 471 P.2d 386, 401-02 (Alaska 1970)) (footnotes omitted). Of course, state courts also may rule that "a state constitutional provision grants less protection than is provided by the federal constitution." *Federalism*, *supra* note 250, at 102 (citing Serna v. Superior Court, 707 P.2d 793 (Cal. 1985)).

A unique provision in Article I, § 24 of the California Constitution provides that "[r]ights guaranteed by this constitution are not dependent on those guaranteed by the U.S. Constitution." *See Federalism*, *supra* note 250, at 108.

257. *Federalism*, *supra* note 250, at 103 & n.21 (citing Sibley v. Board of Supervisors, 477 So. 2d 1094 (La. 1985); Greenberg v. Kimmelmann, 494 A.2d 294 (N.J. 1985); Robins v. Pruneyard Shopping Center, 592 P.2d 341 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980)).

258. *Federalism*, *supra* note 250, at 101-02.

B. *The State Constitutions*[259]

Forty-three states provide a constitutional right to keep and bear arms.[260] Thirty-eight of these states provide rights the plain language of which seems broader than the Second Amendment's language.[261] Six of these states provide rights to keep and bear arms not only in defense of self, family, home, property and the

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259. Robert Dowlut previously compiled the state constitutional arms provisions. *See* Robert Dowlut, *Guarantees to Arms*, *supra* note 14, at 84-89 (appendix).

260. Those forty-three states are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming.

The seven states that do not provide a constitutional right to arms are: California, Iowa, Maryland, Minnesota, New Jersey, New York and Wisconsin.

261. *See* ALA. CONST. art. I, § 26; ARIZ. CONST. art. II, § 26; ARK. CONST. art. II, § 5; COLO. CONST. art. II, § 13; CONN. CONST. art. I, § 15; FLA. CONST. art. I, § 8; GA. CONST. art. I, § 1, para. VIII; IDAHO CONST. art. I, § 11; ILL. CONST. art. I, § 22; IND. CONST. art. I, § 32; KAN. BILL OF RIGHTS § 4; KY. BILL OF RIGHTS § 1, para. 7; LA. CONST. art. I, § 11; MASS. CONST. pt. 1, art. XVII; ME. CONST. art. I, § 16; MICH. CONST. art. I, § 6; MISS. CONST. art. III, § 12; MO. CONST. art. I, § 23; MONT. CONST. art. II, § 12; NEB. CONST. art. I, § 1; NEV. CONST. art. I, § II, para. 1; N.H. CONST. pt. 1, art. 2-a; N.M. CONST. art. II, § 6; N.D. CONST. art. I, § 1 (amended 1984); OHIO CONST. art. I, § 4; OKLA. CONST. art. II, § 26; OR. CONST. art. I, § 27; PA. CONST. art. I, § 21; R.I. CONST. art. I, § 22; S.D. CONST. art. VI, § 24; TENN. CONST. art. I, § 26; TEX. CONST. art. I, § 23; WASH. CONST. art. I, § 24; WYO. CONST. art. I, § 24.

Of the remaining six states, Alaska, Hawaii, North Carolina and South Carolina have constitutional guarantees that exactly match the language of the Second Amendment. ALASKA CONST. art. I, § 19; HAW. CONST. art. I, § 17; N.C. CONST. art. I, § 30; S.C. CONST. art. I, § 20. Virginia, after adding a Right to Arms Clause, now has substantially the same language as the Second Amendment. VA. CONST. art. I, § 20.

Despite their broader plain language, fourteen of the forty-three state constitutions expressly condition the right to keep and bear arms on factors other than the need for a well regulated militia. Specifically, the Colorado, Kentucky, Louisiana, Mississippi, Missouri, Montana, New Mexico and North Carolina constitutions either proscribe or allow their legislatures to regulate the carrying of concealed weapons. *See* COLO. CONST. art. II, § 13; KY. BILL OF RIGHTS § 1, para. 7; LA. CONST. art. I, § 11; MISS. CONST. art. III, § 12; MO. CONST. art. I, § 23; MONT. CONST. art. II, § 12; N.M. CONST. art. 11, § 6; N.C. CONST. art. I, § 30.

The Tennessee and Texas constitutions allow their legislatures to regulate the wearing of arms in order to prevent crime. *See* TENN. CONST. art. I, § 26; TEX. CONST. art. I, § 23.

Idaho's constitution provides that the legislature may punish the use of firearms. *See* IDAHO CONST. art. I, § 11.

Illinois' constitution expressly subjects the individual right to keep and bear arms to the police power. *See* ILL. CONST. art. I, § 22.

Georgia's constitution provides that the legislature may regulate the manner of bearing arms. *See* GA. CONST. art. I, § 1, para. VIII.

Oklahoma's constitution provides that the legislature may regulate the carrying of weapons. *See* OKLA. CONST. art. II, § 26.

state, but also for hunting, recreational and other lawful uses.[262] Thirty of these states use language roughly corresponding to the Michigan Constitution: "*Every person* has a right to keep and bear arms for the defense of *himself and* the state."[263] Thus, most states (1) expressly guarantee an individual right to keep and bear arms; (2) do not condition the right on the necessity of a well regulated militia to the security of a free state; and (3) also provide an individual right of self-defense.[264]

C. *Case Studies: The Maine and West Virginia Constitutions*

Even though many state constitutional arms provisions provide a broader right to keep and bear arms than the Second Amendment provides,[265] most state courts have held that their own state's constitutional right to keep and bear arms is not absolute:

> [C]ourts throughout the country have recognized that the constitutional right to keep and bear arms is not absolute, and these courts have uniformly upheld the police power of the state through its legislature to impose reasonable regulatory control over the state constitutional right to [keep and] bear arms in order to promote the safety and welfare of its citizens.[266]

Since the right to keep and bear arms is not absolute, each state may reasonably regulate this right in order to promote the health, safety and welfare of all its citizens.[267]

This Section considers the Maine and West Virginia constitutional arms provisions in order to illustrate the broad right to keep and bear arms that exists in many states. Although both states' constitutions provide a broader right to keep and bear arms than the Second Amendment provides, both states' legislatures may use their police powers to regulate the right to keep and bear arms.

1. *The Maine Constitution.* Maine's constitution provides: "Every citizen has a right to keep and bear arms and this right shall never be questioned."[268] This language provides a broader

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262. These states are: Delaware, Nebraska, Nevada, New Mexico, North Dakota and West Virginia.

263. MICH. CONST. art. I, § 6 (emphasis added).

264. *See id.*

265. *See supra* part IV.B.

266. State *ex rel.* City of Princeton v. Buckner, 377 S.E.2d 139, 146 (W. Va. 1988); *see also* State v. Brown, 571 A.2d 816, 818 (Me. 1990).

267. *Brown*, 571 A.2d at 820-21; *Buckner*, 377 S.E.2d at 145-49.

268. ME. CONST. art. I, § 16. From 1819 to 1987, article I, § 16 provided: "Every citizen has a right to keep and bear arms *for the common defense*; and this right shall never be questioned." *Brown*, 571 A.2d at 816 n.1 (emphasis added). In 1987, the people of Maine

right to keep and bear arms than the Second Amendment provides for at least two reasons. First, unlike the Second Amendment, which creates an ambiguous "right of the *people* to keep and bear arms,"[269] Maine's constitution creates an unambiguous[270] right to keep and bear arms for "[*e*]*very citizen.*"[271] This specific language suggests that Maine's right to keep and bear arms is an individual, not a government right.[272] Second, unlike the Second Amendment's Militia Clause,[273] which conditions the right to keep and bear arms on the necessity of a well regulated militia, Maine's constitutional right to keep and bear arms is unconditional.

Even though Maine's constitutional right to keep and bear arms "shall never be questioned,"[274] Maine's legislature may use its police powers to regulate this right in order to promote the general welfare of Maine's citizens.

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voted to amend § 16 in order to delete the phrase "for the common defense." *Id.* at 816. As Maine's Attorney General explained in the required explanatory statement, *see* ME. REV. STAT. ANN. tit. 1, § 353 (West 1989), the amendment's purpose was to "establish a new *personal* right to keep and carry weapons, in place of the existing [collective] right to bear arms for the common defence." *Brown*, 571 A.2d at 817-18 (quoting attorney general's explanatory statement). This amendment was necessary because prior to 1987, the Supreme Judicial Court of Maine had held that the old § 16 did not establish a personal right to keep and bear arms, but only a collective right of defense. *See id.* at 818 (citing State v. Friel, 508 A.2d 123 (Me. 1986)); *see also* State v. McKinnon, 133 A.2d 885, 888-89 (Me. 1957) (suggesting in *dicta* that "[i]f [the defendant's] possession of [a] firearm was for the purpose of and used in hunting," and not for the purpose of ensuring "the common defense," such possession "could not possibly come within the constitutional rights of [the defendant] in bearing arms for the common defense").

269. U.S. CONST. amend. II (emphasis added). For a discussion of the meaning of the term "people" in the Second Amendment, see *infra* part II.B.4.

270. *See Brown*, 571 A.2d at 819. Even though the language of § 16 is unambiguous, the court rejected the defendant's contention that "we need not, and indeed must not, look beyond the bare words." *Id.* Citing Justice Holmes' decision in Gompers v. United States, 233 U.S. 604, 610 (1914), the court observed that "the words of the First Amendment are equally unambiguous and unqualified . . . [y]et the . . . Supreme Court has 'reject[ed] the view that freedom of speech and association are "absolutes" . . . in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment.' " *Brown*, 571 A.2d at 819 (quoting Konigsberg v. State Bar, 366 U.S. 36, 49 (1961)).

271. *See* ME. CONST. art. I, § 16 (emphasis added).

272. *But see supra* note 268. Even where the right to keep and bear arms is an individual right, the source of the right may be the collective right of *all* individuals to keep and bear arms "for the common defense," i.e., to protect the state from federal or foreign invasion. *See Armed Citizens*, *supra* note 15, at 615-22; *Historiography*, *supra* note 1, at 2 n.4; *see also supra* text accompanying note 268.

For a comparison of the state's right and individual right theories in Second Amendment interpretation, see *supra* part I.

273. "A well regulated militia being necessary to the security of a free state, ..." U.S. CONST. amend. II.

274. ME. CONST. art. I, § 16.

a. *Maine's "Non-Absolute" Right.* In *State v. Brown*,[275] the Supreme Judicial Court of Maine interpreted the right to keep and bear arms in the context of a criminal statute that prohibits convicted felons from possessing firearms.[276] Before 1988, Edward Brown was convicted of operating a motor vehicle after his license was revoked.[277] Since Brown's license had been revoked because he was an "habitual motor vehicle offender,"[278] he was charged with a felony and convicted.

In 1988, Brown was indicted under criminal law section 393(1) for, *inter alia*, possession of a firearm by a felon.[279] On his motion to dismiss, Brown argued that Maine's possession-by-a-felon statute is unconstitutional because, under article I, section 16 of Maine's constitution, the right to keep and bear arms is absolute and, therefore, the state cannot infringe this right due to his previous conviction.[280]

The trial court dismissed Brown's indictment, holding section 393(1) unconstitutional as it applied to Brown.[281] Specifically, the trial court recognized that the right to keep and bear arms is not absolute, but concluded that "there is no rational relationship between the possession of a firearm by a person previously convicted of a . . . felony and a threat to public safety."[282]

The Supreme Judicial Court vacated the trial court's dismissal of the indictment.[283] The court held that article I, section 16 does not provide an absolute right to keep and bear arms;[284] rather, section 16 provides an *individual* right that is "subject to reasonable regulation by the legislature."[285] In support of its holding, the court cited the attorney general's explanatory statement[286] and what it called the "common sense view of the . . . voters of Maine

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275. 571 A.2d 816 (Me. 1990).

276. ME. REV. STAT. ANN. tit. 15, § 393(1) (West 1989) provides: "No person who has been convicted of any crime . . . which is [a felony] . . . shall own, have in his possession or under his control any firearm, unless such person has obtained a permit under this section." *Id.*

277. *Brown*, 571 A.2d at 817 n.3.

278. *Id.*; *see also* ME. REV. STAT. ANN. tit. 29, §§ 2292(1)(B), 2298(2) (Supp. 1989). Maine's "habitual motor vehicle offender" charge is a felony punishable by up to five years imprisonment. ME. REV. STAT. ANN. tit. 29, § 2298(2) (Supp. 1989).

279. *Brown*, 571 A.2d at 816; *see supra* note 276.

280. *Brown*, 571 A.2d at 817.

281. *Id.*

282. *Id.* Thus, the trial court reasoned that the Maine legislature had exceeded its police powers in enacting § 393(1). *See id.*

283. *Id.* at 822.

284. *Id.* at 817, 819.

285. *Id.* at 818.

286. *See supra* text accompanying note 268.

. . . ."[287]

(1) *The Explanatory Statement.* Before Maine's voters amended section 16 in 1987,[288] the Maine attorney general published the required explanation of the proposed amendment.[289] This explanation provided:

> The proposal would amend the Maine Constitution to establish a new personal right to keep and carry weapons, in place of the existing right to bear arms for the common defense. In proposing the amendment, several legislators formally expressed their understanding and intention that the proposed personal right, like the existing collective right, *would be subject to reasonable limitation by legislation* enacted at the state or local level.[290]

Since publication of this explanation creates a presumption that Maine's voters have "full knowledge of the terms of the amendment,"[291] the court assumed that the voters intended to adopt the amendment under the terms of the explanatory statement, "including the interpretation that the individual right created by the amendment . . . is *not absolute* but rather remains subject to reasonable regulation by the legislature."[292]

(2) *The Common Sense View.* The court next suggested that common sense requires that amended section 16 does not provide an absolute right to keep and bear arms:

> Plainly, the people of Maine who voted for the amendment never intended that an *inmate at Maine State Prison or a patient at a mental hospital* would have an absolute right to possess a firearm. Once it becomes apparent, as common sense requires it to be, that amended section 16 does not bar some reasonable regulation of the constitutional right to possess firearms, the only remaining question becomes what are the outer bounds of reasonableness for the regulation of that non-absolute right.[293]

Using two extreme examples to illustrate the consequences of an absolute right to keep and bear arms, the court reasoned that Maine voters could not possibly have intended such consequences

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287. *Brown*, 571 A.2d at 818.

288. *See supra* text accompanying note 268. Section 16 was amended in 1987 to read as it does today. *See supra* part IV.C.1. For a discussion of Maine's constitutional amendment procedure, see *Brown*, 571 A.2d at 817.

289. ME. REV. STAT. ANN. tit. 1, § 353 (West 1989).

290. *Brown*, 571 A.2d at 817-18 (quoting attorney general's explanatory statement) (emphasis added).

291. *Id.* at 818 (quoting Opinion of the Justices, 133 A. 265, 266 (1926)).

292. *Id.* (emphasis added).

293. *Id.*

and, therefore, the right to keep and bear arms was not absolute.[294] Thus the court considered whether prohibiting a convicted felon like Brown from possessing a firearm was an unreasonable regulation of the right to keep and bear arms.

b. *Reasonable Regulation.* The court first noted that the legislature has " 'police power' to pass general regulatory laws promoting the public health, welfare, safety, and morality."[295] But the legislature must exercise its police powers reasonably: "Reasonableness in the exercise of the State's police power requires that [1] the purpose of the enactment be in the interest of the public welfare and . . . [2] the methods utilized bear a rational relationship to the intended goals."[296] The court first recognized Maine's legitimate state purpose to protect the public from "the possession of firearms by those previously found to be in such serious violation of the law that imprisonment for more than a year has been found appropriate."[297]

Next, the court explained the rational relationship between prohibiting convicted felons from possessing firearms and the goal of protecting the public: "One who has committed any felony has displayed a degree of lawlessness that makes it entirely reasonable for the legislature, concerned for the safety of the public it represents, to want to keep firearms out of the hands of such a person."[298] Since Brown, as an "habitual motor vehicle offender," operated a motor vehicle after his license had been revoked, Brown demonstrated such a disregard for the law that, as applied to him, the legislative determination that he is an undesirable person to

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294. *Id.*

295. *Id.* at 820. Maine's constitutional "police power" clause provides: "The Legislature, with the exceptions hereinafter stated, shall have full power to make and establish all *reasonable* laws and regulations for the defense and benefit of the people of this State, not repugnant to this Constitution, nor to that of the United States." ME. CONST. art. IV, pt. 3, § 1 (emphasis added). Thus Maine's constitution requires that the legislature's regulation of constitutional rights be reasonable. *Brown*, 571 A.2d at 820.

296. *Brown*, 571 A.2d at 820 (quoting National Hearing Aid Cntrs., Inc. v. Smith, 376 A.2d 456, 460 (Me. 1977)). Eight months later, the Supreme Judicial Court reaffirmed this two-pronged test in Hilly v. City of Portland, 582 A.2d 1213, 1215 (Me. 1990).

297. *Brown*, 571 A.2d at 821. The court cited decisions from several state jurisdictions which had espoused "the legitimate state purpose of protecting the public from misuse of firearms." *Id.* at 820. The court also discussed the Supreme Court's decision in Lewis v. United States, 445 U.S. 55 (1980), in which the Court endorsed Congress' legitimate interest in keeping "guns out of the hands of those who have demonstrated that 'they may not be entrusted with a firearm without becoming a threat to society.' " *Id.* at 820-21 (quoting *Lewis*, 445 U.S. at 63 (quoting Scarborough v. United States, 431 U.S. 563, 572 (1977))).

298. *Id.* at 821.

possess a firearm[299] bore a rational relationship to the legislature's interest in promoting the public safety.[300] Thus, the court concluded that Maine's possession-by-a-felon statute constituted a reasonable regulation of the state's constitutional right to keep and bear arms. Eight months later, the court would uphold one more regulation on the carrying of concealed weapons.

c. *Other Limitations.* In *Hilly v. City of Portland*,[301] the Supreme Judicial Court held that the state can regulate the carrying of concealed weapons by requiring its citizens to complete a concealed firearms permit application.[302] When James Hilly failed to complete the entire form, his application was denied.[303] Hilly then filed a complaint and later moved for summary judgment that the concealed firearms statute unconstitutionally infringed the right to keep and bear arms.[304] After the trial court denied his motion,[305] Hilly appealed. The Supreme Judicial Court affirmed the judgment,[306] holding that the concealed firearms statute is rationally related to the state's "justifiable public safety concern" posed by the carrying of concealed weapons.[307]

Even though article I, section 16 of Maine's Constitution pro-

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299. This legislative determination is embodied in Maine's "possession-by-a-felon" statute. ME. REV. STAT. ANN. tit. 15, § 393(1) (West 1989); *see supra* text accompanying note 276.

300. *See Brown*, 571 A.2d at 821.

301. 582 A.2d 1213 (Me. 1990).

302. *Id.* at 1214-15. Maine's concealed firearms statute is located at ME. REV. STAT. ANN. tit. 25, §§ 2001-2006 (West 1988 & Supp. 1989).

303. *Hilly*, 582 A.2d at 1214.

304. *Id.* at 1214-15.

305. The trial court found that ME. REV. STAT. ANN. tit. 25, §§ 2001-2006 (West 1988 & Supp. 1989) were consistent with the right to keep and bear arms in article I, § 16 of the Maine Constitution. *Hilly*, 582 A.2d at 1215.

306. *Hilly*, 582 A.2d at 1217.

307. *Id.* at 1215. "Recognizing the threat to public safety posed by the carrying of concealed weapons," *id.*, the court held that "Maine's concealed firearms statute is a reasonable response to the justifiable public safety concern engendered by the carrying of concealed firearms. The permit requirements pass constitutional muster as an acceptable regulation of the individual's right to keep and bear arms." *Id.* The court cited the West Virginia Supreme Court of Appeals decision in *In re* Metheney, 391 S.E.2d 635 (W. Va. 1990), as one example of a state court that has held constitutional a statute regulating the carrying of concealed weapons. *Id.*

Although the court did not explain why the carrying of concealed weapons poses a particular public safety risk, one can readily infer the explanation. If a weapon is concealed, then the public is less likely to be aware of the weapon and, therefore, less likely to take precautions against its use. *See id.*; *see also Metheney*, 391 S.E.2d at 638 (concluding that West Virginia concealed firearms statute does not infringe state right to keep and bear arms, but merely regulates manner in which citizens may do so, "given the inherently dangerous nature of a concealed deadly weapon").

vides a broader right to keep and bear arms than the Second Amendment provides, section 16 does not provide an absolute right. Under article IV, part 3, section 1 of Maine's constitution, the legislature may exercise its police power to reasonably regulate the right to keep and bear arms. The legislature has enacted statutes that (1) prohibit convicted felons from possessing firearms and (2) require a license in order to carry a concealed weapon. Even though the language of West Virginia's constitutional right to keep and bear arms differs from the language of Maine's constitutional right, the State of West Virginia has enacted similar statutes regulating the right to keep and bear arms.

2. *The West Virginia Constitution.* West Virginia's constitution provides: "A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational purposes."[308] Like the language of Maine's constitutional arms provision, this language provides a broader right to keep and bear arms than the Second Amendment provides. Unlike the ambiguous[309] Second Amendment, the Militia Clause of which conditions the right of "the *people*" to keep and bear arms on the necessity of a well regulated militia to the security of a free state;[310] article III, section 22 of West Virginia's constitution provides an unconditional right to keep and bear arms for every "*person.*"[311] Moreover, unlike article I, section 16 of Maine's constitution, which does not describe the precise uses for which "[e]very citizen has a right to keep and bear arms;"[312] article III, section 22 specifically provides that the right to keep and bear arms may be used "for the defense of self, family, home and state, and for lawful hunting and recreational use."[313] The specific language of article III, section 22 offers greater protection to West Virginia citizens than the general language of article I, section 16 offers to Maine citizens.[314]

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308. W. VA. CONST. art. III, § 22. The West Virginia legislature proposed this amendment in 1985; it was enacted November 4, 1986.

309. *See supra* part IV.C.1.

310. *See* U.S. CONST. amend. II.; *see also supra* parts II.B.1-3.

311. *See* W. VA. CONST. art. III, § 22.

312. *See* ME. CONST. art. I, § 16.

313. *See* W. VA. CONST. art. III, § 22.

314. Specifically, article I, § 16 of Maine's constitution does not expressly specify "hunting" or "recreational use" as permissible uses of the right to keep and bear arms. ME. CONST. art. I, § 16. Thus, Maine courts could interpret § 16 to exclude such uses. However, § 22 expressly provides the right to keep and bear arms not only for self-defense, but also for "hunting and recreational use." W. VA. CONST. art. III, § 22. Thus, West Virginia courts could uphold reasonable regulations of the right to keep and bear arms as applied to hunt-

Although the language of West Virginia's constitution seems to provide a broader right to keep and bear arms than either the Second Amendment or Maine's constitution provides, the West Virginia legislature's police power also subjects the state's right to keep and bear arms to reasonable regulations.

a. *West Virginia's "Non-Absolute" Right.* In *State* ex rel. *City of Princeton v. Buckner*,[315] West Virginia's Supreme Court of Appeals considered the constitutionality of a statute that proscribed the carrying of "dangerous or deadly weapon[s]" without a state license.[316] When a Princeton City police officer arrested a drunk driver on March 10, 1987, he searched the driver's jacket and found an unlicensed pistol.[317] The officer sought a warrant for the driver's arrest from the county magistrate.[318] The magistrate refused to issue a warrant against the driver, concluding that *West Virginia Code* section 61-7-1, which proscribed the carrying of a "dangerous and deadly weapon" without a license,[319] violated the state constitutional right to keep and bear arms.[320] After the prosecuting attorney filed a writ of mandamus in the county circuit court to compel the magistrate to issue a warrant, the circuit court concluded that section 61-7-1 violated the right to keep and bear arms.[321]

In response to the circuit court's two certified questions, the Supreme Court of Appeals held that section 61-7-1 unconstitutionally infringed on the right to keep and bear arms, since the statute prohibited the carrying of a dangerous or deadly weapon without a

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ing or recreational uses, *see infra* part IV.C.2.b, but could not interpret § 22 to exclude such uses.

315. 377 S.E.2d 139 (W. Va. 1988). For an extensive discussion of the factual background, holding and implications of *Buckner*, see Michael O. Callaghan, Note, State v. Buckner *and the Right to Keep and Bear Arms in West Virginia*, 91 W. VA. L. REV. 425 (1989).

316. *Buckner*, 377 S.E.2d at 141. Specifically, W. VA. CODE § 61-7-1 (1975) provided: "If any person, without a state license therefor . . . carr[ies] about his person any revolver or pistol, dirk, bowie knife, slung shot, razor, billy, metallic or other false knuckles, or other dangerous or deadly weapon of like kind or character, he shall be guilty of a misdemeanor. . . ." *Id.* at 141 n.2.

317. *Id.* at 140.

318. *Id.* at 141.

319. *See supra* text accompanying note 316.

320. W. VA. CONST. art. III, § 22.

321. *Buckner*, 377 S.E.2d at 141. The circuit court then certified two questions to the Supreme Court of Appeals: (1) "[i]s [§ 61-7-1] constitutional in light of . . . Article 3, Section 22 of the Constitution of West Virginia?", and (2) "[m]ay the Legislature of the State of West Virginia by proper legislation regulate the right of a person to keep and bear arms in the State of West Virginia?" *Id.*

license for *any* purpose at all, including constitutionally protected "defensive purposes," namely, "defense of self, family, home and state."[322] Although the state had "a long history of statutory provisions regulating the use of weapons,"[323] the court noted that several states had struck down statutes infringing on constitutional provisions "guaranteeing a right to [keep and] bear arms for *defensive* purposes."[324] Since the language in article III, section 22 provides a "sweeping"[325] right to keep and bear arms "for the defense of self, family, home and state,"[326] but section 61-7-1 "is written as a total proscription of the carrying of a dangerous or deadly weapon without a license[;] . . . . [Section 61-7-1] operate[d] to impermissibly infringe upon [the] constitutionally protected right to [keep and] bear arms for *defensive* purposes."[327] Thus, the court held that section 61-7-1 was unconstitutionally overbroad.[328] The court next considered whether West Virginia could reasonably regulate the right to keep and bear arms.[329]

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322. *Id.* at 144-45; *see* W. VA. CONST. art. III, § 22.

323. *Buckner*, 377 S.E.2d at 141. The court discussed its interpretation of an 1882 statutory arms provision in State v. Workman, 14 S.E. 9 (1891). The statute in *Workman* appeared to grant the right of self-defense only to persons of "good character and standing in the community in which [they] live[]." *See* 1882 W. Va. Acts ch. 135, § 7 (quoted in *Buckner*, 377 S.E.2d at 141 n.4); *see Buckner*, 377 S.E.2d at 141-42. The *Workman* court held that the state constitution guaranteed a right of self-defense, but implied that the Second Amendment limited the right to keep and bear arms to a "popular or collective" but not a personal right. *Buckner*, 377 S.E.2d at 142. The *Buckner* court distinguished *Workman* on the grounds that West Virginia's "Right to Keep and Bear Arms Amendment," which was codified as article III, § 22 of the state's constitution, provided a much broader right to keep and bear arms. *Id.* at 143; *see* Callaghan, *supra* note 315, at 437.

324. *Buckner*, 377 S.E.2d at 143 (emphasis added) (citing City of Lakewood v. Pillow, 501 P.2d 744, 745-46 (Colo. 1972) (holding unconstitutional ordinance prohibiting possession, carrying or use of "dangerous or deadly weapon[s]," where ordinance was overbroad)); *In re* Brickey, 70 P. 609, 609 (Idaho 1902) (holding unconstitutional ordinance prohibiting carrying of "deadly weapons" within city limits, where ordinance operated to infringe, not merely regulate, right to keep and bear arms); State v. Blocker, 630 P.2d 824, 827 (Or. 1981) (holding unconstitutional statute prohibiting carrying of deadly weapons outside home, where state constitution protected right to keep and bear deadly weapons outside home for defensive purposes). For a discussion of the *Pillow*, *Brickey* and *Blocker* cases, see Callaghan, *supra* note 315, at 438-40.

325. *Buckner*, 377 S.E.2d at 143.

326. W. VA. CONST. art. III, § 22.

327. *Buckner*, 377 S.E.2d at 144 (emphasis added).

328. *Id.* Specifically, the court concluded that "the language embodied in [§ 61-7-1] sweeps so broadly as to infringe a right that it cannot permissibly reach, in this case, the constitutional right of a person to keep and bear arms in *defense* of self, family, home and state . . . ." *Id.* (emphasis added).

329. *Id.* at 145; *see also supra* text accompanying note 321.

b. *Reasonable Regulation.* Like the Maine court in *State v. Brown*,[330] the *Buckner* court stated that the right to keep and bear arms is not absolute.[331] Rather, the state has "police power" to "enact laws, within constitutional limits, to promote the . . . peace, security, morals, health and general welfare" of its citizens.[332] Thus the court held:

> [T]he West Virginia legislature may, through the valid exercise of its police power, *reasonably regulate* the right of a person to keep and bear arms in order to promote the health, safety and welfare of all citizens of this State, provided that the restrictions or regulations imposed *do not frustrate the constitutional freedoms guaranteed* by article III, section 22 of the West Virginia Constitution . . . .[333]

Like the Maine court in *Brown*,[334] the *Buckner* court recognized West Virginia's legitimate state purpose to protect its citizens from the "unfettered" use of constitutionally protected arms.[335] Although the court did not expressly require that a given regulation bear a "rational relationship" to the state's legitimate purpose,[336] the court implicitly adopted this standard: "[T]he legitimate governmental purpose in regulating the right to [keep and] bear arms cannot be pursued by means that broadly stifle the exercise of this right *where the governmental purpose can be more narrowly achieved.*"[337]

Thus the court, in dicta, approved more common state regulations that prohibit (1) handgun possession by individuals previously convicted of a felony,[338] and (2) the carrying of a "dangerous

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330. 571 A.2d 816 (Me. 1986); *see infra* part IV.C.1.

331. *Buckner*, 377 S.E.2d at 145. The court recognized that other jurisdictions have held "a government may regulate the exercise of the right [to keep and bear arms], provided the regulations or restrictions do not frustrate the guarantees of the constitutional provision." *Id.*

332. *Id.* at 146 (citing State *ex rel.* Appalachian Power Co. v. Gainer, 143 S.E.2d 351 (W. Va. 1965)).

333. *Id.* at 149 (emphasis added).

334. *See* State v. Brown, 571 A.2d 816, 820-21 (Me. 1990); *see supra* part IV.C.1.b.

335. *See Buckner*, 377 S.E.2d at 145, 148-49.

336. *Cf. Brown*, 571 A.2d at 820.

337. *Buckner*, 377 S.E.2d at 146 (emphasis added). As one commentator has recognized, a regulation would not bear a rational relationship to West Virginia's legitimate regulatory interests where the regulation infringed on the right to keep and bear arms for *defensive*, as opposed to offensive, purposes. Callaghan, *supra* note 315, at 445. Thus, West Virginia can make it unlawful for any person in possession of a firearm "to carry, brandish or use such weapon in a way or manner to cause, or threaten, a breach of the peace." *See* W. VA. CODE § 61-7-11 (1992 & Supp. 1995), construed in State v. Daniel, 391 S.E.2d 90, 97 (W. Va. 1990).

338. *Buckner*, 377 S.E.2d at 147; *see* Callaghan, *supra* note 315, at 443.

or deadly weapon."[339] Like the Maine court in *Hilly*,[340] two years later the Supreme Court of Appeals would uphold a concealed weapons regulation.

c. *Other Limitations.* In re *Metheney*[341] involved several applicants for licenses to carry concealed weapons.[342] The county circuit court denied the applications on the grounds that the applicants did not state a valid reason for carrying concealed weapons.[343]

On appeal, the Supreme Court of Appeals affirmed. The court denied the applicant's contention that *Buckner* had recognized a constitutional right to carry a *concealed* deadly weapon,[344] and held that the state's concealed weapons licensing statute was a valid exercise of the legislature's police power.[345]

3. *Summary.* Both the Maine and West Virginia constitutions provide a broad, personal right to keep and bear arms. Neither state's right is absolute; both states subject the right to reasonable regulation under their legislatures' police powers.

West Virginia's constitutional provision specifies the uses for the right to keep and bear arms; Maine's constitutional provision does not. Even though this difference might allow the Maine courts to exclude certain arms uses[346] from constitutional protection;[347] the broad right to keep and bear arms in both Maine and West

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339. *See Buckner*, 377 S.E.2d at 147-48; Callaghan, *supra* note 315, at 444. The court implicitly approved the statutory requirements for a license to carry a dangerous or deadly weapon in W. VA. CODE § 61-7-2 (1988). Callaghan, *supra* note 315, at 444-45. Section 61-7-2 requires that a license applicant be (1) a U.S. citizen, (2) a West Virginia resident, (3) an adult of "good moral character" and "temperate habits," (4) not convicted of a felony or handgun offense, (5) employed for the previous five years, (6) qualified to handle handguns, (7) has good reason and cause to carry such a weapon; and, that the applicant (8) post a $5,000 surety bond. *Buckner*, 377 S.E.2d at 148 (summarizing § 61-7-2 requirements).

340. Hilly v. City of Portland, 582 A.2d 1213 (Me. 1990).

341. 391 S.E.2d 635 (W. Va. 1990).

342. *Id.* at 636.

343. *Id.* at 636 & n.1. *See generally*, W. VA. CODE § 61-7-4 (1989) (requiring that an applicant for a license to carry a concealed deadly weapon demonstrate that the weapon is desired "for the defense of self, family, home or state, or other lawful purpose." *Id.* § 61-7-4(a)(6)).

344. *Metheney*, 391 S.E.2d at 637.

345. *Id.* at 638; *see Buckner*, 377 S.E.2d at 145-46.

346. *Compare* State v. McKinnon, 133 A.2d 885, 888-89 (Me. 1957) (holding that the right to keep and bear arms as granted under the Maine constitution may protect the use of firearms in certain hunting situations) *with* State v. Brown, 571 A.2d 816, 816-18 (Me. 1990) (holding that Maine's constitutional right to keep and bear arms is not an absolute right). *See supra* text accompanying note 268.

347. *See supra* text accompanying note 314.

Virginia offers citizens refuge from the Second Amendment's narrow conditional, individual right.[348] This refuge is beneficial for at least two reasons. First, individuals who keep and bear arms may be secure in the knowledge that their conduct, such as hunting or other recreational activity, is engaged in pursuant to a lawful, broad-based state constitutional right. Second, individuals who are denied firearm licenses,[349] or defendants who are charged with crimes for firearm use in self-defense, will be able to raise state constitutional arguments and defenses.

CONCLUSION

The Second Amendment guarantees a conditional, individual right to keep and bear arms. All able-bodied individuals may possess and carry basic firearms, such as handguns and rifles, that are readily accessible, adequate for individual self-defense and capable or being borne on one's person. This individual right is expressly conditioned on the necessity of a well regulated militia to the security of a free state. Only where one keeps and bears arms specifically in order to defend oneself against federal government attempts to establish a tyranny does the Second Amendment protect one's conduct.

If the conditional, individual right theory is correct, then the Second Amendment right to keep and bear arms is a narrow right. Broader protection for individual owners hinges on more liberal state constitutional rights to keep and bear arms like those rights that Maine and West Virginia provide. This theory has at least one virtue: it is not result-oriented, but founded upon the Second

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348. *See also* Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982) (upholding village ordinance banning handgun possession in the home, where Illinois Constitution explicitly subjected citizens' individual right to keep and bear arms to "the police power"); Robertson v. City of Denver, 874 P.2d 325 (Colo. 1994) (en banc) (upholding ordinance banning manufacture, sale or possession of *assault* weapons under Colorado Constitution, where ordinance was reasonably related to legitimate government interest in protecting public health, safety and welfare and reasoning that "unique characteristics of assault weapons coupled with prevalent use of such weapons for criminal purposes establish that such weapons pose a substantial threat to the health and safety of the citizens of Denver") (emphasis added); Kellogg v. City of Gary, 562 N.E.2d 685 (Ind. 1990) (holding state-created right to bear arms (1) includes right to carry handgun with license, (2) is protected by the Due Process Clause, and (3) is both a property and liberty interest for purposes of § 1983, where Indiana Constitution provided broadly that "[t]he people shall have a right to bear arms, for the defense of themselves and the State").

349. *See, e.g., Kellogg*, 562 N.E.2d at 692-96 (holding that citizens had cause of action under Due Process Clause and 42 U.S.C. § 1983 (1988), where city violated state constitutional right to keep and bear arms by denying citizens blank handgun application forms); *cf.* Hilly v. City of Portland, 582 A.2d 1213 (Me. 1990) and *In re* Metheney, 391 S.E.2d 635 (W. Va. 1990).

Amendment's historical context and language. Even if this theory does not end the search for plain meaning, it enables the search to begin in the proper place.